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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TURABO MEDICAL CENTER, INC. D/B/A HOSPITAL
INTERAMERICANO DE
MEDICINA AVANZADA,

Petitioner,

v.

MARÍA YOLANDA MARCANO RIVERA ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR A WRIT OF CERTIORARI

ORLANDO H. MARTÍNEZ-
ECHEVERRÍA
FERNANDO E. AGRAIT
701 Ponce de León Avenue
San Juan, P.R. 00907
(787) 722-2378

THEODORE B. OLSON
Counsel of Record
THOMAS H. DUPREE, JR.
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

QUESTIONS PRESENTED

A jury awarded respondents \$5.5 million for medical malpractice. Although this is a diversity action governed by Puerto Rico law, the district court and the First Circuit refused to apply Puerto Rico's strict excessiveness standard for reviewing medical malpractice awards on the ground that the Puerto Rico standard was "similar" to the federal excessiveness standard, and denied petitioner's request for remittitur.

The following questions are presented:

1. Whether the decision below contravenes *Erie Railroad v. Tompkins* by granting respondents a recovery that more than doubles the recovery respondents could have obtained in Puerto Rico court.

2. Whether, under *Gasperini v. Center for Humanities, Inc.*, federal courts sitting in diversity must apply state law excessiveness standards (as the Eighth and Tenth Circuits have held), the federal excessiveness standard (as the Sixth, Seventh, and Ninth Circuits have held), or whether the inquiry turns on the similarity of the standards (as the First Circuit has held).

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

In addition to the parties named in the caption, the following parties were plaintiffs-appellees below and are respondents in this Court: Jorge Rodríguez Matos, Conjugal Partnership Rodríguez Marcano, Fabiola Rodríguez Marcano.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Centro Medico Del Turabo, Inc. (Turabo Medical Center, Inc.) d/b/a Hospital Interamericano de Medicina Avanzada has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Turabo Medical Center, Inc. d/b/a Hospital Interamericano de Medicina Avanzada ("HIMA") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 415 F.3d 162. App., *infra*, at 1a. The order denying HIMA's petition for panel rehearing or rehearing en banc is unreported. *Id.* at 31a. The opinion of the United States District Court for the District of Puerto Rico denying HIMA's motion for remittitur is unreported. *Id.* at 20a.

JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1332(a)(1). The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on July 15, 2005. App., *infra*, at 1a. It denied HIMA's timely petition for panel rehearing or rehearing en banc on September 6, 2005. *Id.* at 31a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT

This Court's decision in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), has generated significant confusion among lower courts. Some circuits interpret *Gasperini* as requiring the application of state excessive damages standards in all diversity cases; the First Circuit, however, engages in a case-by-case analysis and applies the state standard only where it is not "expressed in terms similar to the federal standard." App., *infra*, at 17a. A third group of circuits—in clear contravention of *Gasperini*—has continued routinely to apply federal excessiveness standards in diversity actions without undertaking any *Erie* analysis and without even considering the possibility that the state standard may govern. This case presents the Court with the opportunity to clarify *Gasperini*'s holding and to vindicate *Erie*'s fundamental purpose of ensuring that, in diversity actions, "the outcome of the litigation in the federal court [is] substantially the same . . . as it would be if tried in a State court." *Ferens v. John Deere Co.*, 494 U.S. 516, 524 (1990) (internal quotation marks omitted).

1. On the morning of September 14, 2000, María Marcano Rivera was admitted to HIMA, a hospital located in Caguas, Puerto Rico, pursuant to her obstetrician's decision to induce labor. App., *infra*, at 2a. The obstetrician, Dr. Pedro Roldán Millan, was not a HIMA employee, but had privileges to practice in the hospital. *Id.*

HIMA nurses connected Marcano to a fetal heart rate monitor, and Dr. Roldán then induced labor by simultaneously administering to Marcano both an intravenous drip containing Oxytocin and a 100-mcg tablet of Cytotec. App., *infra*, at 2a-3a. Both drugs stimulate uterine contractions. *Id.* at 3a. When administered together, they have a multiplier effect that produces frequent and intense contractions that can decrease the flow of oxygen to the fetus. *Id.* The simultaneous administration of Oxytocin and Cytotec is therefore

contrary to HIMA protocol and the standards of the American College of Obstetricians and Gynecologists. *Id.* The 100-mcg tablet of Cytotec was also four times larger than the recommended dose. *Id.*

After administering the drugs to Marciano at 11:45 a.m., Dr. Roldán left her room and did not return for three hours. App., *infra*, at 3a. Marciano testified at trial that she soon began to experience intense contractions and that the HIMA nurse responsible for monitoring her condition did not respond to her calls. *Id.* The HIMA nurse's manual recordings of the fetal heart rate do not reveal any fetal distress during this period. *Id.* at 4a.

Dr. Roldán returned to Marciano's room at 2:45 p.m. and remained with her throughout the duration of the delivery. App., *infra*, at 3a. The fetal heart rate tracing indicates that the intensity of Marciano's contractions increased at 3:45 p.m. and that the fetus's heart rate simultaneously dropped, which suggests that the fetus was not receiving adequate oxygen. *Id.* at 4a. Both HIMA's and respondents' experts agreed at trial that Dr. Roldán should have responded to Marciano's condition by disconnecting the Oxytocin drip to reduce the strength of her contractions, turning Marciano on her side to increase the flow of oxygen to the fetus, administering oxygen to Marciano, and—if these measures failed—performing a cesarean section. *Id.* at 9a-10a. Dr. Roldán took none of these steps. *Id.* at 10a.

According to the fetal heart rate tracing, Marciano's intense contractions and the low fetal heart rate continued until at least 5:00 p.m., when the heart rate monitor was disconnected in preparation for delivery. App., *infra*, at 4a. Baby Fabiola was born at 6:19 p.m. *Id.* She was immediately taken to HIMA's neonatal intensive care unit, where she was diagnosed with neonatal asphyxia. *Id.* The deprivation of oxygen to the brain caused Fabiola permanent neurological

damage, and she will require a caregiver for the rest of her life. *Id.* at 5a.

2. Marcano and her husband filed a medical malpractice action on behalf of themselves, their conjugal partnership, and Fabiola against Dr. Roldán, his insurance company, and HIMA in the Puerto Rico Court of First Instance. Four months later, Marcano and her husband filed a nearly identical suit in the United States District Court for the District of Puerto Rico, App., *infra*, at 5a, and obtained a voluntary dismissal of their suit in Puerto Rico court. The federal complaint, which premised jurisdiction on diversity of citizenship and asserted claims under Puerto Rico law, alleged that Fabiola's injuries were caused by negligence on the part of Dr. Roldán and HIMA. *Id.*

Respondents settled their claims against Dr. Roldán and his insurer for \$500,000, App., *infra*, at 5a, but their claim against HIMA proceeded to trial. Because Dr. Roldán was not a HIMA employee, Puerto Rico law required respondents to establish that HIMA itself had committed negligent acts that caused Fabiola's neurological injuries. *Id.* at 5a n.3. Respondents' case against HIMA rested entirely upon the allegation that the HIMA nurse failed to monitor Marcano's contractions and the fetal heart rate between 11:45 a.m. and 2:45 p.m., when Dr. Roldán was absent from Marcano's room. *Id.* at 5a.

The jury returned a \$5.5 million verdict in favor of respondents. App., *infra*, at 6a. It awarded \$4 million to Fabiola; \$1 million to Marcano; and \$500,000 to Marcano's husband. *Id.* at 18a. The award to Fabiola included \$1.9 million for future health-care costs, \$1.75 million for mental and physical suffering, and \$350,000 for loss of income. *Id.* at 17a-18a. Because the jury apportioned 47% of the fault to HIMA and 53% to Dr. Roldán, HIMA is responsible for \$2.585 million of the total judgment. *Id.* at 6a.

After the verdict, HIMA moved for judgment as a matter of law or for a new trial because all the evidence presented at trial indicated that Dr. Roldán alone was responsible for Fabiola's injuries. The district court disagreed, and concluded that a reasonable jury could have found that the HIMA nurse's alleged failure to monitor Marciano's contractions and the fetal heart rate contributed to Fabiola's injuries. App., *infra*, at 23a.

HIMA also moved for remittitur on the ground that the \$5.5 million verdict exceeded the recovery respondents would have obtained in a Puerto Rico court. HIMA argued that, because respondents' suit was a diversity action governed by Puerto Rico law, this Court's decision in *Gasperini*, 518 U.S. 415, required the district court to evaluate the \$5.5 million verdict under Puerto Rico's medical malpractice excessive damages standard. Under that standard, the Puerto Rico Supreme Court inquires whether a verdict is "ridiculously low or exaggeratedly high" by comparing it to awards in similar Puerto Rico cases. See *Nieves-Cruz v. Universidad de Puerto Rico*, 151 P.R. Dec. 150 (2000) (App., *infra*, at 52a).¹

The district court denied HIMA's motion for remittitur and rejected the argument that excessiveness should be determined by reference to Puerto Rico law. App., *infra*, at 25a. Relying upon First Circuit decisions that refused to apply Puerto Rico's excessive damages standard in diversity actions and that instead utilized the federal standard, the district court explained that "[f]ederal district courts are not constrained by the amounts awarded by the Supreme Court of Puerto Rico when making a determination of alleged exces-

¹ Certified translations of the Puerto Rico decisions cited in this petition were filed with the First Circuit and are reproduced in the Appendix, *infra*.

siveness of a jury award." *Id.* at 26a (citing *Grajales-Romero v. Am. Airlines, Inc.*, 194 F.3d 288, 300 (1st Cir. 1999)).

3. HIMA appealed to the United States Court of Appeals for the First Circuit, which affirmed the district court's denial of HIMA's request for judgment as a matter of law or a new trial. App., *infra*, at 12a, 15a.

The court of appeals also affirmed the denial of HIMA's motion for remittitur. App., *infra*, at 18a. The court stated that, under *Gasperini*, "federal courts sitting in diversity must apply state substantive law standards in reviewing jury awards if the state law departs from the federal standards for judging excessiveness." *Id.* at 15a. It also recognized that "the Puerto Rico Supreme Court has remitted a damages award in at least two medical malpractice cases to conform with" its seminal decision in *Riley v. Rodríguez de Pacheco*, 119 P.R. Dec. 762 (1987). App., *infra*, at 16a (citing *Blás Toledo v. Hosp. Nuestra Señora de la Guadalupe*, 146 P.R. Dec. 267 (1998), and *Nieves-Cruz*, 151 P.R. Dec. 150). In *Riley*, the Puerto Rico Supreme Court reduced by half an \$800,000 verdict in favor of a child who, like Fabiola, suffered permanent neurological damage due to neonatal asphyxia. *Id.* at 212a, 215a. The court of appeals further acknowledged that, in *Nieves-Cruz*, the Puerto Rico Supreme Court had relied upon *Riley* to reduce by half a \$4 million malpractice award to a child who was neurologically harmed due to asphyxiation during birth. *Id.* at 16a.

Characterizing the issue as "a close one," the court of appeals ultimately refused to follow these Puerto Rico Supreme Court precedents. App., *infra*, at 16a. The court concluded that, even though it was sitting in diversity, it was not obliged to apply Puerto Rico's medical malpractice excessive damages standard because Puerto Rico's "exaggeratedly high" standard "has been expressed in terms *similar* to the federal" grossly excessive standard. *Id.* at 17a (emphasis added); see also *id.* at 16a ("Puerto Rico's 'exaggeratedly

high' standard echoes the federal 'grossly excessive' standard."). In light of the facial similarity between the terms "exaggeratedly high" and "grossly excessive," the court explained that it was

unable to conclude that . . . the Puerto Rico Supreme Court has adopted a more rigorous standard of review for medical malpractice damages that is tantamount to a substantive rule of law that must be applied in diversity cases. That is, we cannot say, on the basis of the available precedents, that Puerto Rico case law suggests a departure from [the] ordinary practice of reviewing awards under the federal standards for judging excessiveness.

Id. at 17a (internal quotation marks omitted; brackets in original).

The court of appeals therefore evaluated the verdict against HIMA under the federal excessiveness standard, which required a comparison with awards in other First Circuit medical malpractice cases (rather than with similar Puerto Rico cases). App., *infra*, at 18a. The court of appeals identified a single First Circuit case that upheld a \$2 million medical malpractice award and, on that basis, concluded that remittitur was unwarranted. *Id.* (citing *Muniz v. Rovira*, 373 F.3d 1, 6 (1st Cir. 2004)).

REASONS FOR GRANTING THE PETITION

In *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), this Court established the general principle that federal courts sitting in diversity must apply state substantive law and federal procedural rules. *Id.* at 78; *see also* 28 U.S.C. § 1652 ("The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in

cases where they apply.”)² Lower federal courts have often struggled to distinguish between substance and procedure in the *Erie* setting. See *Gasperini*, 518 U.S. at 427 (“Classification of a law as ‘substantive’ or ‘procedural’ for *Erie* purposes is sometimes a challenging endeavor.”) (footnote omitted). This Court’s review has thus been frequently required to guide lower courts in implementing *Erie*’s holding. See, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (holding that federal law governs the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds).

In *Gasperini*, this Court concluded that federal courts sitting in diversity must apply state substantive standards when reviewing damage awards for excessiveness because “*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.” *Gasperini*, 518 U.S. at 431. The *Gasperini* Court failed to clarify, however, whether a state excessive damages standard is *always* “substantive” under *Erie* or whether federal courts must make this determination on a case-by-case basis.³

² The Commonwealth of Puerto Rico is considered a “State” for purposes of diversity jurisdiction. See 28 U.S.C. § 1332(e) (“The word ‘States’, as used in this section, includes . . . the Commonwealth of Puerto Rico”). The *Erie* doctrine therefore applies to diversity actions in which federal courts decide claims arising under Puerto Rico law.

³ Several commentators have noted this ambiguity in *Gasperini*’s holding. See Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 1000 n.153 (1998) (it is unclear “whether *Gasperini* should be read as prescribing general applicability of state verdict-excessiveness standards on state claims in federal court or whether there should be case-by-case inquiry into the substantive underpinnings of those rules”) (internal quotation marks omitted); C. Douglas Floyd, *Erie Awry: A Comment on Gasperini v. Center for Humanities, Inc.*, 1997 BYU L. REV. 267, 304

This Court's review is necessary because the First Circuit's refusal to apply Puerto Rico's medical malpractice excessive damages standard in this diversity action impedes *Erie*'s fundamental objective of ensuring a substantial uniformity of outcome between state law claims decided in federal and state court. See *Ferens*, 494 U.S. at 524. To maintain consistency among the size of medical malpractice verdicts, the Puerto Rico Supreme Court regularly remits awards to conform to the benchmark established by *Riley v. Rodriguez de Pacheco*, 119 P.R. Dec. 762. Because the First Circuit applied the *federal* excessive damages standard, it failed to compare the award against HIMA to those in *Riley* and other Puerto Rico cases and therefore upheld a verdict that is significantly larger than the one respondents could have obtained if they had pursued the suit they initially filed in Puerto Rico court.

Certiorari is also warranted because, in *Gasperini*'s wake, a three-way split has developed among the courts of appeals concerning the applicability of state excessive damages standards in diversity actions. The First Circuit conducts a case-by-case inquiry into whether a state excessive damages standard is "substantive," and does not apply state standards that are expressed in facially "similar" terms to the federal standard. The Eighth and Tenth Circuits construe *Gasperini* as requiring federal courts sitting in diversity to apply state excessive damages standards in *all* cases, including where the state and federal standards are worded identically. A third group of circuits—including the Sixth, Seventh, and Ninth Circuits—continues routinely to apply the federal excessive damages standard in diversity actions without engaging in any *Erie* analysis and without even consider-

[Footnote continued from previous page]

("the [*Gasperini*] Court's opinion never came to grips with the sense in which New York's standard should be regarded as a 'substantive' rule").

ing the possibility of applying state law. This case affords the Court the opportunity to resolve this substantial confusion among the lower courts.

I. The First Circuit's Decision Conflicts With *Erie* Because It Upholds A Larger Damage Award Than Would Have Been Permitted In Puerto Rico Court.

In *Gasperini*, this Court declared unequivocally that "*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." 518 U.S. at 431. If respondents had pursued the suit that they initially filed in the Puerto Rico Court of First Instance, the Puerto Rico Supreme Court would have compared the size of the verdict against HIMA to damage awards in other Puerto Rico medical malpractice cases. That comparison would have yielded a reduction in the verdict because the award in this case more than doubles the amount of awards upheld in similar Puerto Rico cases. This Court's review is therefore necessary to vindicate *Erie*'s fundamental purpose of ensuring that state and federal courts adjudicating state law claims reach consistent results.

1. The *Erie* doctrine rests upon the "twin aims" of discouraging forum shopping between state and federal courts, and preventing the inequitable administration of state laws to the detriment of forum state residents. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); see also *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) ("the accident of diversity of citizenship [must not] disturb equal administration of justice in coordinate state and federal courts sitting side by side"). Underpinning *Erie* is the recognition that the "rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. . . . Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts." *Ragan v. Merchs. Transfer & Ware-*

house Co., 337 U.S. 530, 532 (1949). If state and federal courts applied different substantive law to adjudicate state-created rights, out-of-state litigants might be encouraged to select federal court to secure the application of more advantageous law, thereby denying in-state defendants the benefit of their own state law.

To effectuate *Erie*'s twin aims, a federal court sitting in diversity must therefore "approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). Indeed, "a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State." *Guar. Trust Co. v. York*, 326 U.S. 99, 108 (1945). The faithful application of state substantive law enables the federal court to replicate the result that would have been obtained if the case had been brought in state court. See *Van Dusen v. Barrack*, 376 U.S. 612, 638-39 (1964) ("What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts.").

2. In *Gasperini*, this Court considered whether *Erie* required a federal court sitting in diversity to apply a New York statute that authorized state trial and appellate courts to order remittitur where the jury's award "deviates materially from what would be reasonable compensation." N.Y. C.P.L.R. § 5501(c). New York state court opinions interpreted the "deviates materially" standard as requiring more stringent scrutiny of damage awards than the "shocks the conscience" test applied by the Second Circuit in federal question cases. *Gasperini*, 518 U.S. at 425.

The *Gasperini* Court's analysis was guided by *Erie*'s "twin aims," and the Court accordingly inquired whether "application of the [state] standard [would] have so important an effect upon the fortunes of one or both of the litigants that

failure to apply it would unfairly discriminate against citizens of the forum State, or be likely to cause a plaintiff to choose the federal court.” *Gasperini*, 518 U.S. at 428 (internal quotation marks and alterations omitted).

The *Gasperini* Court resolved this question by acknowledging that a state law statutory cap on damages would be substantive for *Erie* purposes, and by then determining that the only difference between the New York statute and a statutory cap was that the New York statute established the maximum recovery through a comparison with similar cases rather than by imposing a firm ceiling. *Gasperini*, 518 U.S. at 429 (“the maximum amount recoverable is not set forth by statute, but rather is determined by case law”) (internal quotation marks omitted). The Court therefore concluded that the New York statute was substantive and must be applied in diversity actions because application of the more permissive federal excessive damages standard would have resulted in “substantial variations between state and federal money judgments.” *Id.* at 430 (internal quotation marks and alterations omitted). These variations would have encouraged plaintiffs to file in federal courts and to avoid state courts—precisely the type of forum shopping that *Erie* seeks to prevent. Similarly, when undertaken by out-of-state plaintiffs, such forum shopping would have deprived in-state defendants of the protection of New York’s excessive damages statute. Application of the New York standard was therefore required to effectuate *Erie*’s objectives and to “preclude[] a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.” *Id.* at 431.

3. The First Circuit ran afoul of *Erie*’s “twin aims” and *Gasperini*’s reasoning when it relied upon the superficial similarity between the Puerto Rico and federal excessive damages standards to conclude that the Puerto Rico standard is inapplicable in diversity actions.

It is the firmly established policy of Puerto Rico law to promote consistency among compensatory damages awards in medical malpractice cases. The baseline for Puerto Rico's medical malpractice excessive damages standard is *Riley v. Rodríguez de Pacheco*, 119 P.R. Dec. 762. In *Riley*, the plaintiff brought suit on behalf of herself and her minor child alleging that the defendants' medical malpractice had resulted in her child being deprived of oxygen during birth. App., *infra*, at 176a. The asphyxiation caused the child permanent neurological harm, which manifested itself in difficulty walking and diminished intellectual capacity. *Id.* at 208a. The trial court awarded the child \$500,000 for bodily injuries and \$300,000 for past and future mental suffering. *Id.* at 211a.

The Puerto Rico Supreme Court remitted the award. App., *infra*, at 214a. In so doing, it expressed significant concern about the difficulty of quantifying damages for mental and physical suffering. The court emphasized that "human sorrow and physical pain are not similar or financially assessable" and that "[w]ithout reasonable limits, compensation would no longer bear the characteristics of a redress, but would rather become punitive." *Id.* at 212a. Such limits were necessary, the court continued, not only because of the inherently speculative nature of establishing damage awards, but also to ensure that "compensation for damages does not become a lucrative forensic industry where doctors and patients are the raw materials." *Id.* at 213a (footnote omitted); *see also id.* ("when passing on medical malpractice cases, . . . we remember that the healing hand does not reach the degree of social offense of the injuring hand") (internal quotation marks and footnote omitted). The Puerto Rico Supreme Court thus established a "reasonable limit" for medical malpractice awards by deeming the \$800,000 verdict "exaggerated" and reducing it to \$400,000. *Id.* at 214a.

The Puerto Rico Supreme Court has evaluated the propriety of subsequent medical malpractice awards by compar-

ing them with the *Riley* benchmark. In *Blás Toledo v. Hospital Nuestra Señora de la Guadalupe*, 146 P.R. Dec. 267, for example, the plaintiff filed a medical malpractice action after her nearly three-year-old daughter was left in a persistent vegetative state—unable to see, hear, or move—as a result of the deprivation of oxygen to her brain during a surgery. App., *infra*, at 151a. The Puerto Rico Supreme Court relied upon *Riley* to reduce the child's mental and physical damage award from \$500,000 to \$250,000. *Id.* at 152a. It also reduced the damages for the mother's emotional suffering from \$800,000 to \$400,000. *See id.* ("it is our opinion that the \$800,000 compensation awarded for such items by the trial court is 'exaggeratedly high,' especially in light of the decision in *Riley v. Rodríguez de Pacheco*") (emphasis omitted).

The Puerto Rico Supreme Court also relied upon *Riley* to reduce the damages awarded in *Nieves-Cruz v. Universidad de Puerto Rico*, 151 P.R. Dec. 150, a medical malpractice case with facts that are nearly identical to the instant case. In *Nieves-Cruz*, the plaintiff alleged that hospital staff caring for her during labor improperly administered a combination of drugs that should not have been used together and that these drugs impaired the fetus's respiratory function, resulting in a lack of oxygen to the brain. App., *infra*, at 34a. The deprivation of oxygen caused the child to develop permanent physical and mental disabilities. *Id.* He was completely dependent on others for all of his daily tasks, including feeding, cleanliness, and dressing. *Id.* at 67a. The trial court awarded the child \$750,000 for physical pain, \$325,000 for impairment of income, and \$2.9 million for costs of care (a total of \$3.975 million). *Id.* at 35a. The Puerto Rico Supreme Court reduced each of the awards by half because they were "substantially higher than what we have granted in cases similar to this case." *Id.* at 52a. In so doing, the court explicitly relied upon the award in *Riley* as the benchmark. *See id.* at 53a ("In the instant case, pursuant to the decision in *Riley v. Rodríguez de Pacheco*, the \$750,000 item for physical dam-

ages granted by the lower court should be reduced. *Following the parameters of the precedent mentioned*, we deem reasonable the sum of \$375,000.”) (emphasis added; citation omitted).

Riley, *Blás Toledo*, and *Nieves-Cruz* embody Puerto Rico’s strong substantive policy of ensuring consistency among medical malpractice awards. If respondents’ case had gone to trial in the Puerto Rico Court of First Instance, the Puerto Rico Supreme Court would have determined whether the damage award was excessive by comparing the \$5.5 million verdict with those in *Riley*, *Blás Toledo*, and *Nieves-Cruz*. The Puerto Rico Supreme Court would have remitted the \$5.5 million verdict because it more than doubles the awards in those comparable Puerto Rico cases. The decision in *Nieves-Cruz*—where the Puerto Rico Supreme Court relied upon *Riley* to reduce by half a \$3.975 million verdict to a child with neurological injuries due to asphyxiation during birth—indicates that the court would have reduced the \$4 million in damages awarded to Fabiola, whose injuries are virtually indistinguishable from those in *Nieves-Cruz*. The court would also have remitted the \$1.5 million award to Fabiola’s parents because the figure is significantly larger than the \$400,000 parental recovery authorized in *Blás Toledo*.

The First Circuit, however, refused to utilize the Puerto Rico Supreme Court’s comparative analysis because it concluded that the Puerto Rico medical malpractice excessive damages standard “has been expressed in terms similar to the federal standard.” App., *infra*, at 17a. On the basis of this linguistic “similar[ity],” the court held that Puerto Rico’s standard is not substantive for *Erie* purposes. *Id.* Thus, instead of comparing the verdict against HIMA to awards in other Puerto Rico cases, the court asked whether the verdict “shocked the conscience” and whether it was out of line with prior First Circuit awards. *Id.* at 17a-18a. Relying upon a single First Circuit decision upholding a \$2 million medical

malpractice award, the court of appeals affirmed the district court's denial of remittitur. *Id.* at 18a (citing *Muniz*, 373 F.3d at 6).⁴

Because the First Circuit applied the federal standard, the accident of the parties' diversity of citizenship enabled respondents to obtain a significantly larger award than they would have received had they pursued the claim that they initially filed in Puerto Rico court. *Cf. Gasperini*, 518 U.S. at 429 ("if federal courts . . . persist in applying the [federal] 'shock the conscience' test to damage awards on claims governed by New York law, 'substantial' variations between state and federal money judgments may be expected") (internal quotation marks, alterations, and footnote omitted). Respondents' recovery of a sizable award unavailable in the Puerto Rico courts is inconsistent with the *Erie* doctrine's animating principle of securing uniformity between state and federal adjudications of state law claims. *See Ragan*, 337 U.S. at 532 (*Erie* "was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court.").

4. The First Circuit's conclusion that Puerto Rico has not developed a substantive excessive damages standard in medical malpractice cases is also inconsistent with the "rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts" that is required in light of the "unique cultural and legal history of Puerto Rico." *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 339 n.6 (1986); *see*

⁴ Notably, in *Muniz*, the defendant failed to raise an excessiveness objection at the trial level, and the court of appeals therefore reviewed the award for plain error, which is an even more relaxed standard than the "shocks the conscience" standard that the court below applied when reviewing the award against HIMA. 373 F.3d at 9.

also *De Castro v. Bd. of Comm'rs*, 322 U.S. 451, 457 (1944) ("This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here.").

As discussed above, the First Circuit disregarded an unambiguous line of decisions in which the Puerto Rico Supreme Court has employed a comparative excessive damages standard that requires medical malpractice awards to conform to prior awards in Puerto Rico courts. See *Riley*, 119 P.R. Dec. 762; *Blás Toledo*, 146 P.R. Dec. 267; *Nieves-Cruz*, 151 P.R. Dec. 150. The First Circuit's failure to adhere to the Puerto Rico Supreme Court's excessive damages case law conflicts with both the "rigid rule of deference" to decisions of the Puerto Rico Supreme Court and basic *Erie* principles requiring a federal court sitting in diversity to defer to the pronouncements of a State's highest court. See *Vandenbark v. Owens-Ill. Glass Co.*, 311 U.S. 538, 540 (1941) (*Erie* "made the law of the state, as declared by its highest court, effective to govern tort cases cognizable in federal courts on the sole ground of diversity").

Because it declined to apply Puerto Rico's medical malpractice excessive damages standard, the First Circuit upheld a substantially larger verdict than would have survived appeal to the Puerto Rico Supreme Court. This Court's review is necessary to vindicate *Erie*'s underlying purpose of "establish[ing] . . . substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726-27 (1988).

II. The Decision Below Reflects The Circuits' Profound Confusion Over *Gasperini*.

Gasperini establishes that a federal court sitting in diversity must apply a state excessive damages standard that is

“substantive” in nature. In the wake of that decision, however, the circuits have split over the scope of *Gasperini*’s holding.

The First Circuit pursues an imprecise *ad hoc* inquiry into whether a state excessiveness standard is substantive, and does not apply state standards that have “been expressed in terms similar to the federal standard.” App., *infra*, at 17a. The Eighth and Tenth Circuits, on the other hand, have held that state law excessive damages standards are applicable in *all* diversity actions, even where the state standard is worded identically to the federal standard. See, e.g., *Rustenhaven v. Am. Airlines, Inc.*, 320 F.3d 802, 805 (8th Cir. 2003) (“The question of the excessiveness of a verdict in a diversity case such as this is judged in accordance with state substantive law.”). A third approach is pursued by the Sixth, Seventh, and Ninth Circuits, each of which has issued post-*Gasperini* decisions applying the federal excessive damages standard without undertaking any *Erie* analysis or even acknowledging the possibility that state law may govern. See, e.g., *Miksis v. Howard*, 106 F.3d 754, 764 (7th Cir. 1997) (“We use federal standards to determine excessiveness of verdicts in diversity cases.”).

1. The Eighth and Tenth Circuits apply state excessive damages standards in all diversity cases, even where the state standard is phrased identically to the federal standard.⁵ In *Rustenhaven v. American Airlines, Inc.*, 320 F.3d at 804, for example, the Eighth Circuit reviewed a compensatory dam-

⁵ There is some slight variation among the circuits in their phrasing of the federal excessive damages standard. Compare *Miksis*, 106 F.3d at 76 (“We will vacate a damages award only if it is ‘monstrously excessive,’ considering whether it is out of line with verdicts in similar cases, or if it bears no rational connection to the evidence.”), with *Pescatore v. PAN AM*, 97 F.3d 1, 18 (2d Cir. 1996) (“In a federal question case, a district court will ordinarily deem an award excessive if it ‘shocks the judicial conscience.’”).

ages award to an air crash survivor. The diversity action was governed by Arkansas law, and the court explained that the

question of the excessiveness of a verdict in a diversity case such as this is judged in accordance with state substantive law. Under Arkansas's standard of review, a verdict is excessive where the award is so great that it shocks the conscience of the court or demonstrates that the trier of fact was motivated by passion or prejudice.

Id. at 805-06 (citing *Gasperini*, 518 U.S. at 426-38) (internal quotation marks omitted).

Arkansas's "shocks the conscience" standard is expressed in identical terms to the excessive damages standard that the Eighth Circuit applies in federal question cases. See *Morse v. S. Union Co.*, 174 F.3d 917, 925 (8th Cir. 1999) ("We must consider whether the awards, as remitted by the District Court, are so grossly excessive as to shock the court's conscience.") (internal quotation marks omitted). Despite this overlap, the Eighth Circuit applied the Arkansas standard, rather than the federal standard. *Rustenhaven* therefore indicates that, under the Eighth Circuit's interpretation of *Gasperini*, all state excessive damages standards are substantive for *Erie* purposes. Accordingly, in the Eighth Circuit, federal courts sitting in diversity must apply state excessive damages standards—even where the federal and state standards "ha[ve] been expressed in [similar] terms." App., *infra*, at 17a.

The Tenth Circuit has espoused a similar interpretation of *Gasperini*. In *Century 21 Real Estate Corp. v. Meraj International Investment Corp.*, 315 F.3d 1271 (10th Cir. 2003), the court applied New Jersey law to evaluate whether the damages awarded on a state law breach-of-contract claim were excessive. *Id.* at 1281. The court explained that "[i]n a diversity case, as here, state law provides the appropriate

rules of decision for the district court to determine whether the verdict was excessive.” *Id.* (citing *Gasperini*, 518 U.S. at 437). In deciding to apply state law, the court gave no weight to the fact that the New Jersey excessive damages standard is worded identically to the standard that the Tenth Circuit applies in federal question cases. Compare *Century 21 Real Estate Corp.*, 315 F.3d at 1282 (“A court should not interfere with the jury’s determination unless it ‘is so disproportionate’ as to ‘shock [the court’s] conscience’”) (quoting *McRae v. St. Michael’s Med. Ctr.*, 794 A.2d 219, 227 (N.J. Super. Ct. App. Div. 2002)), with *Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 531 (10th Cir. 2000) (“absent an award so excessive or inadequate as to shock the judicial conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial, the [jury’s] determination of the amount of damages is inviolate.”) (alteration in original; internal quotation marks omitted).

Century 21 therefore demonstrates that, in the Tenth Circuit, state excessive damages standards must be applied in all diversity cases, even if there is a substantial similarity between the terms of the federal and state standards. See also *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1251 (10th Cir. 2000) (applying New Mexico’s excessive damages standard, which—like the Tenth Circuit’s federal standard—asks whether the award “‘result[ed] from passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive’”) (quoting *E.W. Richardson v. Rutherford*, 787 P.2d 414, 422 (N.M. 1990)).

2. Unlike the Eighth and Tenth Circuits, the First Circuit does not interpret *Gasperini* as requiring federal courts sitting in diversity to apply state law excessive damages standards that are worded in similar terms to the federal standard. In determining whether to apply Puerto Rico’s “ridiculously low or exaggeratedly high” test when reviewing the verdict against HIMA, the First Circuit emphasized that the Puerto Rico standard “has been expressed in terms similar to the

federal standard," which, in the First Circuit, asks whether "an award is grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." App., *infra*, at 17a (internal quotation marks omitted). In light of this superficial similarity between the Puerto Rico and federal standards, the First Circuit was "unable to conclude . . . that the Puerto Rico Supreme Court has adopted a more rigorous standard of review for medical malpractice damages that is tantamount to a substantive rule of law that must be applied in diversity cases." *Id.* The court therefore evaluated the verdict under the federal excessive damages standard.

The First Circuit reached this conclusion even though HIMA called the court's attention to several decisions in which the Puerto Rico Supreme Court reduced medical malpractice awards that were out of line with the benchmark established in *Riley v. Rodríguez de Pacheco*. See *Nieves-Cruz*, 151 P.R. Dec. 150 (relying upon *Riley* to reduce by half a \$2 million award to a child with neurological damages due to asphyxiation during birth); *Blás Toledo*, 146 P.R. Dec. 267 (relying upon *Riley* to reduce by half awards of \$800,000 and \$500,000 to a mother and child, where the child was left in a vegetative state due to the deprivation of oxygen during surgery); see also *Riley*, 119 P.R. Dec. 762 (reducing by half an \$800,000 verdict to a child who suffered injuries due to asphyxiation during birth). The Puerto Rico Supreme Court's exacting scrutiny of the medical malpractice awards in those cases was irrelevant to the First Circuit's *Erie* analysis because the court of appeals considered the similarity between the language of the Puerto Rico and federal excessive damages standards to be dispositive.⁶

⁶ The Fourth Circuit has espoused a similar understanding of *Gasperini*. In *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 281 (4th Cir. 1999), the district court applied the federal excessive damages standard to evaluate the propriety of an award in a Pennsylvania law diversity

3. The confusion wrought by *Gasperini* is further exemplified by the fact that a number of circuits continue routinely to apply the federal excessive damages standard in diversity actions without considering whether *Erie* and *Gasperini* require application of the state standard.

In *Kapelanski v. Johnson*, 390 F.3d 525 (7th Cir. 2004), for example, the Seventh Circuit applied the federal “monstrously excessive” standard to evaluate a compensatory damages award in an Illinois law diversity action. *Id.* at 532. The court made no mention of *Gasperini* or of the fact that Illinois law does not apply the “monstrously excessive” standard but instead inquires whether the award “falls outside the range of fair and reasonable compensation or results from

[Footnote continued from previous page]

action. On appeal, the Fourth Circuit initially observed that, under *Gasperini*, the district court should have applied the Pennsylvania—rather than the federal—standard. *Id.* at 280. The court nevertheless concluded that the district court’s error was harmless because the federal and state standards are expressed in similar terms. *Id.* at 281. Pennsylvania’s standard asks whether an award “so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake, or corruption.” *Id.* (quoting *Carminati v. Phila. Transp. Co.*, 176 A.2d 440, 445 (Pa. 1962)). The Fourth Circuit considered this state standard to be “analogous” to the Fourth Circuit’s federal standard, which inquires whether a “verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice.” *Id.* at 280 (internal quotation marks omitted).

In light of the facial similarity between the federal and state standards, the Fourth Circuit determined that it was unnecessary to remand the case for the district court to apply the Pennsylvania standard. *Konkel*, 165 F.3d at 281. In reaching this conclusion, the Fourth Circuit did not consider whether the Pennsylvania standard had been interpreted by state courts to require a more stringent review than the federal standard; the “analogous” wording of the two standards was sufficient. The court of appeals then reviewed the district court’s excessive damages analysis for an abuse of discretion as if it had actually applied the Pennsylvania standard. *Id.*

passion or prejudice, or . . . is so large that it shocks the judicial conscience." *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997) (internal quotation marks omitted); see also *Miksis*, 106 F.3d at 764 ("We use federal standards to determine excessiveness of verdicts in diversity cases.").

Like the Seventh Circuit, the Sixth and Ninth Circuits have issued post-*Gasperini* decisions that applied the federal excessive damages standard in a diversity action without engaging in any *Erie* analysis or even referencing *Gasperini*. See *Am. Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 475 (6th Cir. 2004) (applying the federal excessive damages standard in a diversity action governed by California law); *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001) (same in a diversity action governed by Montana law).⁷

Because the lower federal courts routinely disregard *Gasperini*'s holding that state substantive law governs the excessive damages inquiry in diversity cases and are intractably split over *Erie*'s application in the excessive damages setting, this Court's review is necessary to reinforce *Gasperini*'s teachings and to provide much-needed guidance to the lower courts on this recurring and divisive issue. The First Circuit's excessive damages analysis cannot be recon-

⁷ The circuits' post-*Gasperini* disarray is also evident from several decisions in which the First Circuit applied the federal excessiveness standard without undertaking the case-by-case *Erie* inquiry that it pursued below. See *Trull v. Volkswagen of Am., Inc.*, 320 F.3d 1, 9 (1st Cir. 2002) (applying the federal excessive damages standard in a case governed by New Hampshire law); *Smith v. Kmart Corp.*, 177 F.3d 19, 30 (1st Cir. 1999) (same in a diversity action governed by Puerto Rico law). The Tenth Circuit, which typically applies state excessive damages standards in all diversity cases, has similarly issued a post-*Gasperini* decision in which it applied the federal excessiveness standard in a diversity action. See *Woolard v. JLG Indus.*, 210 F.3d 1158, 1173 (10th Cir. 2000) ("Federal law governs the decision whether a remittitur should be granted in a diversity case.").

ciled with the compelling principles that animate the *Erie* doctrine, and the Court therefore should grant this petition to clarify that *Erie* does not condone the First Circuit's *ad hoc* analysis but instead requires the application of state law excessiveness standards in *all* diversity cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ORLANDO H. MARTÍNEZ-
ECHEVERRÍA
FERNANDO E. AGRAIT
701 Ponce de León Avenue
San Juan, P.R. 00907
(787) 722-2378

THEODORE B. OLSON
Counsel of Record
THOMAS H. DUPREE, JR.
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

December 5, 2005

APPENDIX

APPENDIX A

**United States Court of Appeals
First Circuit**

Maria Yolanda
MARCANO RIVERA;
Jorge Rodríguez Matos;
Fabiola Rodríguez Marcano,

Plaintiffs-Appellees,

v.

No. 04-2494

TURABO MEDICAL
CENTER PARTNERSHIP
d/b/a Hospital Interamericano
De Medicina Avanzada,

Defendant-Appellant.

Heard April 8, 2005
Decided July 15, 2005

Orlando H. Martínez-Echeverría, with whom Fernando E. Agrait was on brief, for appellant.

Jorge M. Suro Ballester, with whom Carlos A. Ruiz was on brief, for appellees.

Before LYNCH, LIPEZ, and HOWARD, Circuit Judges.
LIPEZ, Circuit Judge.

Defendant Hospital Interamericano de Medicina Avanzada ("HIMA") appeals from a jury verdict finding that it was negligent in monitoring the birth of Fabiola Rodríguez Marcano and that its negligence caused Fabiola severe and permanent neurological damage. HIMA argues that there was insufficient evidence to establish its liability and that the evidence showed instead that Dr. Pedro Roldán Millan ("Dr. Roldán"), the non-employee obstetrician who delivered Fabiola, was solely responsible for Fabiola's injuries. HIMA further claims that the district court erred in allowing testimony by one of the plaintiffs' experts and in not remitting the damages award or awarding a new trial on apportionment of liability. We affirm.

I.

A. Factual background

We take the facts from the trial record, reciting them in the light most favorable to the verdict. *See Grajales-Romero v. Am. Airlines*, 194 F.3d 288, 292 (1st Cir.1999).

On the morning of September 14, 2000, plaintiff María Marcano Rivera ("Marcano") was admitted to HIMA, a hospital in Caguas, Puerto Rico, pursuant to her obstetrician's decision to induce labor. The obstetrician, Dr. Roldán, was not an employee of HIMA but had privileges there.

At 10 a.m., HIMA nurses attached Marcano to a fetal monitor, which monitors both the fetus's heart rate and the mother's uterine contractions. A fetal monitor provides a digital display of the fetal heart rate and prints out a paper record, known as a tracing, of the heart rate and the contractions. HIMA protocol dictates that nurses check the fetal monitor and record the fetal heart rate every 15 minutes during high-risk deliveries, including induced labor. HIMA protocol also provides that the nurse monitoring the delivery is responsible for notifying the physician of any abnormal fetal heart rate or uterine contraction findings.

At 11:45 a.m., Dr. Roldán induced labor by simultaneously administering Oxytocin through an intravenous drip and inserting in Marcano's vagina a 100 mcg tablet of Cytotec from his personal supply. Dr. Roldán's simultaneous administration of the two drugs was contrary to HIMA protocol and medical standards established by the American College of Obstetricians and Gynecologists ("ACOG"). Both Oxytocin and Cytotec stimulate uterine contractions; together they have a multiplier effect and can produce contractions that are too intense or too close together, thereby decreasing the flow of oxygen to the fetus. ACOG thus recommends a four-hour waiting period between administering Oxytocin and Cytotec. Moreover, the recommended dose of Cytotec—when taken alone—is only 25 mcg. The higher 100 mcg dose administered by Dr. Roldán also risks producing contractions which are too intense or too close together.

Shortly after Dr. Roldán administered the drugs, he left Marcano's room. Marcano soon began to feel intense contractions. Although she rang the nurse call button repeatedly, the nurse monitoring the delivery, Brenda Marrero, did not respond.

When Marcano's husband, Jorge Rodríguez Matos ("Rodríguez"), joined her at approximately 2:30 p.m., he found her in a desperate state because of frequent contractions. She told him that the contractions were not like the ones she experienced with the delivery of her first child and that she could not stand the pain. Rodríguez went to the nurses' station and asked them to summon Dr. Roldán. At approximately 2:45, Dr. Roldán returned to Marcano's room and administered Demerol, a pain killer. He remained in the room throughout the rest of the delivery.

Oddly, the tracing from the fetal heart rate monitor is missing for the period between 10 a.m. and 3:27 p.m., meaning there is no way to evaluate the fetus's heart rate and oxygen supply while Marciano was alone in her hospital room.¹ The tracing between 3:27 p.m. and 3:45 p.m. appears normal, but that reading does not preclude the possibility that the fetus was deprived of oxygen during the period for which the tracing is missing. Between 3:45 p.m. and 5 p.m., the tracing reveals a continuing pattern of contractions that were too intense and too close together, accompanied by a low fetal heart rate. These factors suggest that the fetus was not receiving sufficient oxygen. The tracing ends at approximately 5 p.m., when Marciano was transferred to the delivery room and the monitor was disconnected.

Baby Fabiola was born at 6:19 p.m. She was taken immediately to the neonatal intensive care unit, where she was diagnosed with neonatal asphyxia and seizures secondary to

1 The record does include a form that purports to be Nurse Marero's recording of the fetal heart rate every 30 minutes based on the monitor's digital display. However, the plaintiffs' expert questioned the accuracy of the entries on the form, testifying at trial that

the frequency of the registered fetal heart rates was inadequate because it was every 30 minutes [instead of every 15 minutes as dictated by HIMA protocol], but the fetal heart rates which are registered in this form . . . are totally out of context with regards not only to the part of the fetal heart rate tracing which we did get an opportunity to evaluate, but [also] of the catastrophic condition of the baby when she was born. This is like another patient, another labor and delivery. This registers perfectly normal fetal heart tones . . . [that] are totally out of context with the clinical picture.

neonatal asphyxia, and where she spent approximately two weeks before being discharged to her parents. Marcano and Rodríguez did not learn until four months later that Fabiola had permanent neurological damage as a result of neonatal asphyxia. Fabiola continues to suffer from daily seizures, and her prognosis is grim. Although she has an anticipated life span of 45 years, she will never see, walk, or communicate, and will require a caregiver for the rest of her life.

B. Procedural history

On January 16, 2002, the plaintiffs sued Dr. Roldán and HIMA² in federal district court for medical malpractice resulting in severe neurological damage to Fabiola. Early in the litigation, the plaintiffs reached a settlement with Dr. Roldán, who is no longer in practice. Their malpractice claims against HIMA proceeded to trial in October 2003, principally on the theory that HIMA employees failed to adequately monitor the labor and childbirth process and that HIMA's failure contributed to Fabiola's injuries.³ Specifically, the plaintiffs suggested that the neurological damage occurred during the period for which the tracing is missing, and that regular monitoring would have alerted Dr. Roldán to Fabiola's distress in enough time to avert permanent damage.

Following a five-day trial, the jury returned a verdict in favor of the plaintiffs. The jury found that both HIMA and Dr. Roldán had been negligent and that their negligence was the proximate cause of the plaintiffs' damages. It awarded

2 HIMA is also known as Centro Médico del Turabo, Inc.

3 Because Dr. Roldán was not an employee of HIMA, the hospital is not vicariously liable for his negligence during the delivery process. Its liability is limited to the acts and omissions of its own employees—here, the nursing staff.

\$5.5 million in damages, apportioning 47% of the liability to HIMA and 53% of the liability to Dr. Roldán. Accordingly, the court entered judgment against HIMA for \$2.585 million (*i.e.*, 47% of \$5.5 million). The court subsequently denied HIMA's post-verdict motion for judgment as a matter of law, a new trial on apportionment of liability, or remittitur.

II.

HIMA raises several arguments on appeal. First, it asserts that the district court erred in denying its motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. Second, it assigns error to the district court's decision to admit testimony by one of the plaintiffs' expert witnesses. Finally, HIMA contends that the district court abused its discretion in failing to grant its motion for a new trial or remittitur under Federal Rule of Civil Procedure 59. We consider these claims in turn.

A. Motion for Judgment as a Matter of Law

While conceding that Fabiola suffered permanent neurological damage during birth, HIMA argues that the evidence at trial was insufficient to allow a reasonable jury to conclude that the damage was causally linked to negligent monitoring. The district court rejected this argument in denying a post-verdict motion for judgment as a matter of law, concluding that

there was ample evidence presented to the jury, which if believed, could sustain a finding that HIMA was indeed negligent in monitoring plaintiff's labor and that said negligence proximately caused the alleged injuries. . . . [T]he jury heard evidence that the monitoring was done every thirty minutes as opposed to every 15 minutes, as was standard in induced labors. Most importantly, the jury was allowed to make reasonable inferences from the

fact that a significant portion of the tracing of the fetal heart rate and uterine contractions monitoring machine was missing, and HIMA was unable to give any explanation therefor.

A party seeking to overturn a jury verdict faces an uphill battle. "Courts may only grant a judgment contravening a jury's determination when the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." *Rivera Castillo v. Autokirey, Inc.*, 379 F.3d 4, 9 (1st Cir. 2004) (internal quotation marks omitted). We review *de novo* the district court's denial of a motion for judgment as a matter of law, viewing the evidence in the light most favorable to the nonmoving party. *Tapalian v. Tusino*, 377 F.3d 1, 5 (1st Cir.2004).

The substantive law of Puerto Rico governs this diversity suit. See *Rojas-Ithier v. Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R.*, 394 F.3d 40, 43 (1st Cir.2005). To prevail on a medical malpractice claim under Puerto Rico law, "a party must establish (1) the duty owed; (2) an act or omission transgressing that duty; and (3) a sufficient causal nexus between the breach and the harm." *Id.* HIMA cites deficiencies in the plaintiffs' evidence as to both the first and third prongs of this test.

1. Duty

Puerto Rico courts have explained the standard of care owed to patients as "[t]hat [level of care] which, recognizing the modern means of communication and education, . . . meets the professional requirements generally acknowledged by the medical profession." *Lama v. Borrás*, 16 F.3d 473, 478 (1st Cir. 1994) (quoting *Oliveros v. Abreu*, 101 P.R. Dec. 209, 226 (1973)). The standard is a national one, and ordinarily must be demonstrated through expert testimony. *Id.*

Here, the plaintiffs' expert, Dr. José Juan Gorrín Peralta ("Dr. Gorrín"), explained that the standard of care requires monitoring high-risk deliveries, including induced labor, every 15 minutes. Monitoring includes evaluating both the fetal heart rate and uterine contraction information provided by the fetal monitor's paper tracings and the fetal heart rate information provided by the fetal monitor's digital display. Monitoring is a shared responsibility of the doctor and the nurse; when the doctor is not present, the nurse is in charge of the monitoring. Dr. Gorrín's testimony on this point was corroborated by HIMA's expert, Dr. José Vargas Cordero, who testified that when the doctor is not present, the nurse is in charge of checking both the tracing and the digital monitor, and that if the nurse notices an abnormal reading, she must call the doctor.

There was sufficient evidence for the jury to find that HIMA failed to monitor Marcano's labor in accordance with the national standard of care. It is undisputed that Nurse Marrero checked the fetal monitor's digital heart rate display at most every 30 minutes, instead of every 15 minutes as Dr. Gorrín testified was standard. Indeed, the jury may have concluded that Nurse Marrero did not even check the fetal heart rate monitor every 30 minutes. Dr. Gorrín testified that the fetal heart rates recorded by Marrero "are totally out of context not only to the part of the fetal heart rate tracing which we did get an opportunity to evaluate, but of the catastrophic condition of the baby when she was born," implying that Marrero may have falsified the record. Moreover, Marcano testified that she was alone in the hospital room between 11:45 a.m. and 2:30 p.m.—a period of nearly three hours—and that nurses failed to respond when she repeatedly attempted to summon them during that time. Based on this testimony, the jury could reasonably have concluded that Marrero failed to adequately monitor the labor.

2. Causation

To establish causation under Puerto Rico law, “[a] plaintiff must prove, by a preponderance of the evidence, that the physician’s negligent conduct was the factor that ‘most probably’ caused harm to the plaintiff.” *Lama*, 16 F.3d at 478 (quoting *Sierra Perez v. United States*, 779 F. Supp. 637, 643 (D.P.R. 1991)). While this causation standard does not require all other causes of damage to be eliminated, “a jury normally cannot find causation based on mere speculation and conjecture; expert testimony is generally essential.” *Id.*; see also *Rojas-Ithier*, 394 F.3d at 43 (“[A] factfinder normally cannot find causation without the assistance of expert testimony to clarify complex medical and scientific issues that are more prevalent in medical malpractice cases than in standard negligence cases.”).

HIMA argues that there was insufficient evidence for a reasonable jury to find that its negligent monitoring was “most probably” the factor that caused Fabiola to be injured during her delivery. It contends that the evidence demonstrated instead that Fabiola’s injuries were mostly likely the result of Dr. Roldán’s negligence.

The issue of causation is complicated in this case by the disappearance of the fetal monitor tracing for the period between 10 a.m. and 3:27 p.m. Experts for both parties agree that Fabiola’s heart rate was in the normal range for a short time after 3:27, when the tracing begins, and that it dropped perilously low at approximately 5 p.m., shortly before the tracing ends. The experts also agree that the low heart rate reading at 5 p.m. indicates that Fabiola was in distress and that Dr. Roldán, who was present at the time, should have taken steps immediately to ameliorate the situation. Such steps would have included turning off the Oxytocin drip to reduce the strength and frequency of contractions, turning Marcano on her side to increase the flow of oxygen to the fetus, administering oxygen to Marcano, and, if those meas-

ures failed, performing a cesarean section. It is undisputed that Dr. Roldán took none of these steps; by the time Fabiola was born at 6:19 p.m., she was suffering from neonatal asphyxia.

HIMA's medical experts testified that because the fetal monitor indicated a normal heart rate at 3:27 p.m. and an ominously low heart rate at 5 p.m., Fabiola's injuries must have occurred sometime between 3:27 p.m. and 6:19 p.m. Emphasizing that Dr. Roldán was present throughout that period and failed to act, HIMA argues that Fabiola's injuries are directly attributable to the doctor's failure to intervene and that any failure of monitoring before 3:27 p.m. did not cause the asphyxia. HIMA further contends that without the tracing for the period before 3:27 p.m., any conclusion that the injury occurred during that period would be based on impermissible speculation.

HIMA is correct that, without the missing tracing, it is impossible to know with certainty whether the fetus was in distress before 3:27 p.m.—or, more particularly, between 11:45 a.m., when Dr. Roldán induced the labor and left a nurse in charge of the monitoring, and 2:45 p.m., when Dr. Roldán returned to Marcano's bedside to supervise the delivery. It does not follow, however, that no reasonable jury could find that negligent monitoring during that period most probably caused or contributed to Fabiola's injuries. Although HIMA's experts testified that the normal fetal heart rate at 3:27 p.m. indicated a smooth process up to that point, the plaintiffs' expert, Dr. Gorrín, took a different position. He testified that a normal fetal heart rate at 3:27 p.m. does not rule out the possibility that the fetus was in distress earlier:

The baby could have had an hypoxic episode producing asphyxia, and mother nature will try to preserve life, and the baby's heart will not necessarily stay at [the below-normal rate

of] 60 beats per minute or the baby might not even die if he was severely asphyxiated during a window of time when he or she was subjected not to one, but to two medications, one of which at a very excessive dose and another one at a dose we'll never know about, without monitoring. I cannot say just because there was an 18-minute window [between 3:27 p.m. and 3:45 p.m.] with an adequate baseline fetal heart rate that nothing else happened before [the beginning of the tracing at 3:27 p.m.].

Dr. Gorrín's testimony that the fetus may have been deprived of oxygen between 11:45 a.m. and 3:27 p.m. is consistent with the evidence presented about the effects of Oxytocin and Cytotec, the drugs Dr. Roldán used to induce labor. Experts for both parties testified that it is contraindicated to administer Oxytocin and Cytotec simultaneously because, in the words of Dr. Gorrín,

the synergistic effect of one drug, which acts to produce uterine contractions on top of another, which also acts to produce uterine contractions, will cause something like adding two plus two and getting five instead of four . . . One thing works with the other, and the lump effect is a lot more than just the sum of each one.

The experts also testified that contractions that are too intense or too frequent can deprive the fetus of oxygen and lead to a depressed heart rate. Shockingly, Dr. Roldán administered both Oxytocin and Cytotec simultaneously, and he administered four times the appropriate dose of Cytotec.

According to Marciano's testimony, the intense contractions began almost immediately after Dr. Roldán administered the drugs at 11:45 a.m., and continued until at least 2:45 p.m., when her husband summoned Dr. Roldán to return to

the room. That timing is consistent with Dr. Gorrín's testimony that Oxytocin would exert its effect within ten minutes of being administered and that Cytotec, if placed in the vagina as it was here, would also exert its effect in a short while. That timing is also consistent with ACOG's recommendation that doctors wait four hours between administering Oxytocin and Cytotec; the waiting period suggests that either drug exerts its strongest effects in the hours immediately after it is administered. A reasonable jury could therefore have concluded that Marciano suffered the most intense and frequent contractions beginning shortly after 11:45 a.m., that the missing tracing would reveal that Fabiola was deprived of oxygen during this period, and that negligent monitoring between 11:45 a.m. and Dr. Roldán's return at 2:45 p.m. caused or contributed to Fabiola's injuries. Although HIMA's experts testified that the damage occurred later, such contradictory expert testimony "does nothing to vitiate the sufficiency of the plaintiff's proof." *Muniz v. Rovira*, 373 F.3d 1, 5 (1st Cir. 2004).

The plaintiffs introduced sufficient evidence to support a finding that negligent monitoring on the part of HIMA caused Fabiola's injuries. The district court therefore did not err in denying HIMA's Rule 50 motion for judgment as a matter of law.

B. Admission of Expert Testimony

The plaintiffs offered testimony at trial by life-care planner Frank Woodrich regarding the projected cost of Fabiola's future care. HIMA objected to Woodrich's testimony, both through a motion in limine and at trial, arguing that Woodrich's methodology, the foundation for his testimony, was not reliable. The court denied the motion in limine without explanation. In response to the renewed objection at the outset of Woodrich's testimony, the court allowed HIMA to conduct a brief voir dire of Woodrich. After a series of questions focusing on Woodrich's failure to have a physician re-

view his projections regarding Fabiola's future medical needs, HIMA moved again to strike Woodrich as an expert. The district court overruled the motion, commenting that "what you're doing is going to the weight, not to the expertise." HIMA argues that the district court's ruling was erroneous.

The admission of expert testimony is governed by Federal Rule of Evidence 702, which requires that "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Rule 702 "imposes a gate-keeping function on the trial judge to ensure that an expert's testimony 'both rests on a reliable foundation and is relevant to the task at hand.'" *United States v. Mooney*, 315 F.3d 54, 62 (1st Cir. 2002) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). We review the district court's decision to admit expert testimony for abuse of discretion. *Id.*

The district court considered Woodrich's professional credentials and ascertained that he had been admitted as an expert on rehabilitation and life-care planning in numerous state and federal courts before accepting him as an expert in this case. Woodrich also testified that his proposed care plan for Fabiola was based on a review of records from the agency providing her with skilled nursing care, a letter from her physician, and an interview of Fabiola's family and caregiver. Although Woodrich's report might have benefitted from a physician's review of the projections regarding Fabiola's future needs, the court did not abuse its discretion in determining that Woodrich's methodology was sufficiently reliable for admissibility.

C. Motion for a New Trial or Remittitur

Finally, HIMA claims that the district court erred in denying its motion for new trial or remittitur under Federal

Rule of Civil Procedure 59. "A district court should only grant such motions if the outcome is against the clear weight of the evidence such that upholding the verdict will result in a miscarriage of justice." *Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368, 375 (1st Cir. 2004) (internal quotation marks omitted). Our review is for an abuse of discretion. *Id.*

1. *Apportionment of Liability*

HIMA contends that even if its negligent monitoring played a role in Fabiola's injuries, its negligence was far outweighed by Dr. Roldán's negligence in inducing and handling the labor. As such, HIMA maintains, there was insufficient evidence to support a jury finding that it was liable for 47% of the damage and it is entitled to a new trial on apportionment of liability. The district court rejected this argument, ruling that "the plaintiff's expert witness and several documents admitted into evidence" supported a finding that HIMA's negligence caused 47% of the plaintiffs' damages. We agree.

In a repeat of their argument that there was insufficient evidence that the hospital caused or contributed to Fabiola's injuries, HIMA argues that without the missing tracing, any evidence that Fabiola was deprived of oxygen while the nurse was responsible for monitoring in Dr. Roldán's absence (*i.e.*, between 11:45 a.m. and 2:45 p.m.) is impermissible speculation. That reasoning would have the effect of punishing the plaintiffs for HIMA's failure to produce the tracing, and we reject it again. Although there is no way to know for certain what happened between 11:45 a.m. and 2:45 p.m. without the tracing, the circumstantial evidence, together with Dr. Gorrín's expert testimony, would allow a reasonable jury to find that Marcano's strong contractions between 11:45 a.m. and 2:45 p.m. deprived Fabiola of oxygen and that HIMA's negligent monitoring during that period deprived Dr. Roldán of an opportunity to intervene before Fabiola suffered permanent damage. While Dr. Roldán was

unquestionably negligent as well, the 47-53 apportionment of liability was not contrary to the clear weight of the evidence.

2. *Excessiveness*

Under the Supreme Court's holding in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), federal courts sitting in diversity must apply state substantive law standards in reviewing jury awards if the state law departs from the federal standards for judging excessiveness. *See id.* at 431 (“*Erie [R.R. Co. v. Tompkins]*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938),] precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.”). Emphasizing that the Puerto Rico Supreme Court has reduced damages awards to victims of medical malpractice to conform to its own precedent, HIMA maintains that the district court was obligated under *Gasperini* to reduce the plaintiffs’ award to conform with Puerto Rico precedent. The district court rejected this argument in a post-verdict ruling.

We have previously rejected the argument that *Gasperini* requires federal district courts to review damages awards for consistency with awards approved by the Supreme Court of Puerto Rico in similar cases. As we have explained, *Gasperini* would control if state law departed from the ordinary practice of reviewing awards under the federal standards for judging excessiveness, but Puerto Rico law “suggests no such departure.” *Grajales-Romero*, 194 F.3d at 300 (internal quotation marks omitted); *see also Mejias Quiros v. Maxxam Prop. Corp.*, 108 F.3d 425, 427 n.1 (1st Cir.1997) (same); *cf. Stewart v. Tupperware Corp.*, 356 F.3d 335, 339 (1st Cir.2004) (applying *Grajales-Romero* to the amount-in-controversy determination for purposes of diversity jurisdiction).

Emphasizing that none of the cases in which we have rejected *Gasperini* arguments involved medical malpractice claims, HIMA asserts that *Gasperini* requires a remittitur of

damages here despite our extant case law. HIMA's argument is based primarily on *Nieves Cruz v. Universidad de Puerto Rico*, 151 P.R. Dec. 150 (2000), a case in which the Puerto Rico Supreme Court remitted a \$3.9 million award to a minor plaintiff who, like Fabiola, suffered from severe hypoxia during childbirth. In reducing the original judgment by approximately 50%, the Puerto Rico Supreme Court explained that it was "[f]ollowing the parameters of . . . precedent." *Id.* (certified translation). The precedent on which the *Nieves* court relied was *Riley v. Rodríguez De Pacheco*, 119 P.R. Dec. 762, 1987 WL 448254 (1987), in which the court reduced a damages award in a medical malpractice case because "[w]ithout certain reasonable limits, the compensation would cease to have the characteristic of compensation [and would] become punitive" (quoted in *Nieves*, 151 P.R. Dec. 150 (certified translation)). HIMA contends that *Nieves* reflects a Puerto Rico standard for reviewing damages awards in medical malpractice cases that differs from the federal standard of reviewing to determine whether an award is "grossly excessive," and that *Gasperini* requires us to adopt the Puerto Rico standard in this case.

We view this issue as a close one. As HIMA emphasizes, the Puerto Rico Supreme Court has remitted a damages award in at least two medical malpractice cases to conform with the *Riley* precedent. See *Nieves*, 151 P.R. Dec. 150; *Blás Toledo v. Hospital Nuestra Señora De La Guadalupe*, 146 P.R. Dec. 267, 1998 WL 476260 (1998). On the other hand, the Supreme Court of Puerto Rico has indicated that it "will not intervene in the decision on the estimation of damages issued by the lower courts, unless the amounts granted are ridiculously low or exaggeratedly high." *Nieves*, 151 P.R. Dec. 150, 2000 WL 731789 (certified translation). Puerto Rico's "exaggeratedly high" standard echoes the federal "grossly excessive" standard. That consonance distinguishes this case from *Gasperini*, which involved a New York law that empowered state courts to reduce any damages

award that “deviates materially from what would be reasonable compensation.” 518 U.S. at 418, 116 S.Ct. 2211. The Supreme Court emphasized that New York’s “deviates materially” rule entailed “[m]ore rigorous comparative evaluations” than the federal standard and that it had a “manifestly substantive” objective. *Id.* at 429, 116 S.Ct. 2211. Unlike New York’s “deviates materially” standard, the Puerto Rico Supreme Court’s standard has been expressed in terms similar to the federal standard.

In the end, therefore, we are unable to conclude that the remittiturs in *Blás Toledo* and *Nieves* mean that the Puerto Rico Supreme Court has adopted a more rigorous standard of review for medical malpractice damages that is tantamount to a substantive rule of law that must be applied in diversity cases. That is, we cannot say, on the basis of the available precedents, that Puerto Rico case law suggests a “departure from [the] ordinary practice of reviewing awards under the federal standards for judging excessiveness.” *Grajales-Romero*, 194 F.3d at 300 (internal quotation marks omitted) (alteration in original). In the absence of such a departure, *Gasperini* controls. *See id.*

Therefore, the district court did not abuse its discretion in rejecting HIMA’s claim that the damages awarded to the plaintiffs were excessive. “[A] party seeking remittitur bears a heavy burden of showing that an award is grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.” *Currier v. United Techs. Corp.*, 393 F.3d 246, 256 (1st Cir.2004) (internal quotation marks omitted). As the district court recognized, the plaintiffs presented ample evidence of the severe physical and emotional toll that Fabiola’s permanent injuries have inflicted, and will continue to inflict, on both her and her family. Woodrich testified that Fabiola’s life-care plan alone had a cost of approximately \$1.9 million. The plaintiffs also presented evidence that Fabiola’s loss of

potential income was approximately \$350,000, and that Fabiola and her parents suffered severe pain and anguish as a result of her injuries. In light of this evidence, the jury awarded \$4 million to Fabiola, \$1 million to her mother, and \$500,000 to her father.⁴ Moreover, HIMA conceded at trial that it had “presented no evidence to offset Fabiola’s and her family’s damages. We agree that she has suffered serious damages, both the baby and the family. Our sole issues with the damages is not to negate [their] existence, but to make clear that it was Dr. Pedro Roldán, and not HIMA, [who was] the responsible party.” In light of this concession, together with the evidence offered at trial, an award of \$5.5 million (of which HIMA will pay \$2.585 million) does not shock the conscience. See *Muniz*, 373 F.3d at 6 (upholding a medical

4 In summarizing the evidence supporting the \$5.5 million damages award, the court emphasized that

[b]aby Fabiola, who was only three years old at the time of trial, has a long life expectancy. In fact, Dr. Woodrich, an expert in rehabilitation counseling and life care planning, prepared a life care plan for Fabiola which was submitted to the jury. . . . There was also testimony from Carlos Rodríguez, an economist, relative to Fabiola’s loss of potential income. The jury also heard testimony regarding baby Fabiola’s grim prognosis; the fact that she has no chance for a normal development, the fact that she will require a care giver for the rest of her life; and the physical pain and anguish that she endures as a result of her daily physical therapy sessions. The jury also heard testimony of Haydée Costas, an expert in psychiatry, who diagnosed Maria Yolanda Marcano as suffering from a major depression. The record in this case is replete with evidence of the pain endured and yet to be endured by both Fabiola and her parents, as a result of the injuries that she sustained at childbirth.

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malpractice award of \$2 million to a minor who suffered nerve damage to his arm and shoulder at birth).

Affirmed.

APPENDIX B

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO**

**MARIA Y. MARCANO
RIVERA, et al.,**

Plaintiffs,

v.

**Civil No:
02-1068(HL)**

**TURABO MEDICAL
CENTER PARTNERSHIP
d/b/a HOSP. INTERAMERICANO
DE MEDICINA AVANZADA,**

Defendants.

OPINION AND ORDER

Plaintiffs Maria Marcano-Rivera and her husband, Jorge Rodríguez-Matos, filed this medical malpractice lawsuit on behalf of their minor daughter Fabiola Rodríguez Marcano ("baby Fabiola"), against both Dr. Pedro Roldán Millan, an obstetrician, and the Hospital Interamericano de Medicina Avanzada ("HIMA"), seeking compensatory damages for injuries that baby Fabiola suffered during childbirth as a result of the defendants' alleged negligent acts and/or omissions. At the time of childbirth baby Fabiola suffered

severe neurological damage and will never be able to see, walk or speak. The matter was tried before a jury beginning on October 14, 2003. On October 20, 2003, the jury returned a verdict in favor of the plaintiffs and against HIMA.¹ In its verdict, the jury apportioned 47 percent of the total liability to HIMA, thus resulting in an total award of \$2,585,00.00. (See Docket No. 127).

HIMA now moves for judgment as a matter of law or, in the alternative, for a new trial and/or remittitur. (See Docket No. 130.)² After considering the arguments of the parties and for the reasons explained below, HIMA's motion for judgment as a matter of law is **DENIED**. The Hospital's motion for a new trial and/or remittitur is also **DENIED**.

DISCUSSION

A. *Motion for Judgment as a Matter of Law*

A motion for judgment as a matter of law under Fed. R. Civ. P. 50 is appropriate when there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party. See *Richards v. Relentless, Inc.*, 341 F.3d 35, 41 (1st Cir. 2003); *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 50 (1st Cir. 2003). The First Circuit Court of Appeals has stated that "the standards for granting a motion for judgment as a matter of law are stringent." *Rivera Castillo v. AutoKirey, Inc.*, 2004 WL 1785919 *4 (1st Cir. Aug 11, 2004). In fact, "[c]ourts may only grant a judgment contravening a jury's determination when 'the evidence

1 Only the claims against the Hospital HIMA were submitted to the jury given that the plaintiffs entered into a settlement with Dr. Roldán at the early stages of this litigation.

2 The plaintiffs filed an opposition to HIMA's post-judgment motion. (Docket No. 136).

points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party.” *Id.* (citing *Keisling v. SER-Jobs for Progress, Inc.*, 19 F.3d 755, 759-60 (1st Cir. 1994)). See also *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 565 (1st Cir. 2003) (a party seeking recourse under Rule 50(b) and/or Rule 59 faces an uphill battle.) When reviewing a motion under Fed. R. Civ. P. 50, Courts need to “examine the evidence . . . in the light most favorable to the plaintiff and may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence.” *Katz v. City of Metal Co.*, 87 F.3d 26, 28 (1st Cir. 1996); see also, *Alvarez-Sepulveda v. Colon Matos*, 306 F.Supp.2d 100, 104 (D.P.R. 2004). In other words, when looking at the record the Court must draw “all reasonable inferences . . . in the nonmovants’ favor, and resist the temptation to weigh the evidence or make [its] own credibility determinations.” *Zachar v. Lee*, 363 F.3d 70, 73 (1st Cir.2004) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000)).

In its motion for judgment as a matter of law, defendant HIMA argues that the evidence is legally insufficient to support the jury verdict against the Hospital. HIMA argues that the evidence presented at trial supports the conclusion that most, if not all, of plaintiffs’ damages were attributable to the negligence of Dr. Roldán, and not of HIMA. HIMA specifically asserts that plaintiffs failed to demonstrate what was the standard of care that hospitals follow relative to childbirth monitoring, and failed to establish causation between the alleged deficient monitoring of plaintiff’s childbirth and the alleged damages.

The Court finds HIMA’s arguments without merit, and thus, sees no reason to overturn the jury’s verdict. Clearly, the issue in this case was whether HIMA’s employees were negligent in monitoring plaintiff Maria Marcano’s labor, and

if so, if that negligence caused the plaintiff's injuries. Attributing negligence and/or issues of fault is heavily dependant on the credibility of each parties' witnesses. During the trial, the parties presented ample conflicting evidence to the jury in support of their respective theories.³ The jury undeniably opted to believe plaintiffs' witnesses over HIMA's witnesses, and found that forty-seven percent (47%) of the negligence was attributable to defendant HIMA. The Court is not to disturb that determination. When, as here, "fair-minded persons could draw different inferences from the evidence presented at trial, the matter is for the jury," and judgment as a matter of law is not proper. *Espada*

3 The Court notes that there was ample evidence presented to the jury, which if believed, could sustain a finding that HIMA was indeed negligent in monitoring plaintiff's labor and that said negligence proximately caused the alleged injuries. For example, the jury heard evidence from Dr. Gorrin relative to the standard of care that hospitals took in terms of monitoring the childbirth process, and in particular, the frequency in which the monitoring had to take place when labor was induced. Dr Gorrin also testified that physicians are not present throughout the entire childbirth process, and that during the physician's absence, the nurses monitor the childbirth process and inform the physician of any abnormalities in the reading of the fetal heart rate monitor and/or an abnormalities with uterine contraction. In addition, the jury heard evidence that the monitoring was done every thirty minutes as opposed to every 15 minutes, as was the standard in induced labors. Most importantly, the jury was allowed to make reasonable inferences from the fact that a significant portion of the tracing of the fetal heart rate and uterine contractions monitoring machine was missing, and HIMA was unable to give any explanation therefor.

v. *Lugo*, 312 F.3d 1, 2 (1st Cir. 2002).⁴ Thus, HIMA's motion for judgment as a matter of law (Docket No. 130) is hereby **DENIED**.

B. Motion for New Trial under Rule 59

Rule 59 provides, in relevant part, that "[a] new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have theretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). "District Courts 'may set aside a jury's verdict and order a new trial only if the verdict is so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice.'" *Rivera Castillo*, 2004 WL 1785919 *8 (citing *Federico v. Order of Saint Benedict in Rhode Island*, 54 F.3d 1, 5 (1st Cir. 1995)). HIMA argues that the verdict was against the weight of the evidence⁵ and that therefore a new trial on apportionment of liability is warranted. As exemplified by the previous discussion relative to HIMA's Rule 50 motion, there was sufficient evidence from which the jury could have reasonably found that HIMA was negligent in monitoring plaintiff's childbirth, and that said negligence constituted 47 percent of the damages suffered by the plaintiffs. The testimony presented at trial by the plaintiff's expert witness and several documents admitted into evidence support the

⁴ See also, *Muñiz v. Rovira*, 373 F.3d 1, 3 (1st Cir. 2004) (evidence is said to be sufficient no matter which way the jury decides, when the record as a whole plausibly supports more than one answer to a question of fact.)

⁵ In particular, HIMA argues that the evidence does not support the jury's finding that HIMA was 47 percent liable for the damages suffered by plaintiff, and that said percentage should be diminished significantly.

jury's findings. It is within the province of the jury to determine how much weight to give to witnesses and the credibility of each witness. This Court can not conclude that the jury's finding that HIMA was negligent in monitoring baby Fabiola's childbirth, and that said negligence constituted forty-seven percent of plaintiff's liability is against the weight of the evidence, and/or that said verdict constitutes a gross miscarriage of justice. Therefore, HIMA's motion for a new trial is **DENIED**.

C. *Remittitur*

Next is HIMA's contention that the amounts awarded to the plaintiffs are excessive and contrary to Puerto Rico law, requiring remittitur. At the outset it should be noted that HIMA contends that the court must apply the doctrine set forth in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), when reviewing the excessiveness of plaintiffs' award. In *Gasperini* the Supreme Court stated that in cases brought under diversity jurisdiction, such as this one, an award of damages must be reviewed for excessiveness applying substantive law. HIMA argues that the instant jury award should be reviewed by looking at comparable cases decided by the Puerto Rico Supreme Court, such as *Riley v. Rodríguez*, 119 D.P.R. 762 (1987), and *Nieves Cruz v. Universidad de Puerto Rico*, 2000 WL 731789 (P.R. May 31, 2000). HIMA's argument, however, has been rejected by the First Circuit. See *Grajales-Romero v. American-Airlines, Inc.*, 194 F.3d 288, 300 (1st Cir. 1999); see also, *Torres v. Kmart Corp.*, 233 F.Supp.2d 273, 280 (D.P.R. 2002). "The fact that judges in the commonwealth courts frequently award lesser sums than juries in the federal court 'does not override the general rule that a federal jury. . . is not bound in making its determination by the amount that the Commonwealth courts have awarded or approved.'" *Stewart v. Tupperware Corp.*, 356 F.3d 335, 339 (1st Cir. 2004) (citing *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1198

(1st Cir. 1995) (federal courts not bound by Puerto Rico's Supreme Court decisions in the context of amount-in-controversy determinations)).

Federal district courts are not constrained by the amounts awarded by the Supreme Court of Puerto Rico when making a determination of the alleged excessiveness of a jury award. Rather, in determining whether a verdict should be modified, the reviewing court views the evidence in the light most favorable to the prevailing party, and so long as there is some relationship between the claim and the award, the verdict will be allowed to stand. See *Smith v. Kmart Corp.*, 177 F.3d 19, 30 (1st Cir. 1999). "Remittitur of a jury award is ordered when the award 'is grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.'" *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 130 (1st Cir. 2004) (citing *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995)). See also, *Muñiz v. Rovira*, 373 F.3d 1, 6 (1st Cir. 2004) (upholding an award of \$2,000,000.00 in a medical malpractice case against an obstetrician.)

The verdict in this case easily passes the aforementioned test.⁶ Baby Fabiola, who was only three years old at the time of trial, has a long life expectancy. In fact, Dr. Woodrich, an

6 The jury awarded to Fabiola a total of \$4,000,000.00 in compensatory damages; plaintiff Maria Yolanda Marcano, Fabiola's mother, received a total award of \$1,000,000.00 for her pain and suffering; while Jorge Rodríguez Matos, Fabiola's father, received a total award of \$500,000.00. After taking into consideration the apportionment of liability to HIMA, judgment was entered awarding baby Fabiola \$ 1,880,000.00; Maria Yolanda Marcano \$470,000.00; and Jorge Rodríguez Matos \$235,000.00.

expert in rehabilitation counseling and life care planning, prepared a life care plan for Fabiola which was submitted to the jury as Joint Exhibit VII. There was also testimony from Carlos Rodríguez, an economist, relative to Fabiola's loss of potential income. The jury also heard testimony regarding baby Fabiola's grim prognosis; the fact that she has no chance for a normal development, the fact that she will require a care giver for the rest of her life; and the physical pain and anguish that she endures as a result of her daily physical therapy sessions. The jury also heard testimony of Haydée Costas, an expert in psychiatry, who diagnosed Maria Yolanda Marcano as suffering from a major depression. The record in this case is replete with evidence of the pain endured and yet to be endured by both Fabiola and her parents, as a result of the injuries that she sustained at childbirth. The damage award in this case must be upheld because "[t]ransmitting legal damages into money damages is a matter 'peculiarly within the jury's ken,' especially in cases involving intangible, non-economic losses." *Smith v. Kmart Corp.*, 177 F.3d at 30 (quoting *Wagenmann v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987)). Therefore, HIMA's motion for remittitur is hereby **DENIED**.

D. Bill of Costs:

Pursuant to Fed. R. Civ. P. 54(d)(1), "costs other than attorney fees shall be allowed as of course to the prevailing party." 28 U.S.C. § 1920 sets out the basic categories of costs that a court may allow, which include: "(1) [f]ees of the clerk and marshal; (2) [f]ees of the court reporter for all or any part of the stenographic transcript . . .; (3) [f]ees and disbursements for printing and witnesses; (4) [f]ees for exemplification and copies of paper necessarily obtained for use in the case; (5) [d]ocket fees under . . .; (6) [c]ompensation of court appointes experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services. . .". *Pan American Grain Mfg. Co. v.*

Puerto Rico Ports Authority, 193 F.R.D. 26, 33 (D.P.R. 2000) (citing 28 U.S.C. § 1920)).

Plaintiffs submitted an amended bill of costs with the required itemization and documentation (Docket No. 135),⁷ seeking to recover a total of \$3,420.00 in costs.⁸ (See Form AO 133, attached to Docket No. 135). Defendant HIMA did not file an opposition to the amended bill of costs motion. The Court finds that the \$150.00 as fees of the clerk; the \$45.00 as fees for service of summons; and the \$ 392.00 for copies of papers necessary for use in the case are both entirely reasonable and supported by the attached documentation.

In addition, plaintiffs seek to recover \$2,833.38 in other costs, such as; the costs of charts used during trial; translation costs of depositions used during trial; the cost of the video presented at trial; costs of the deposition of some of the expert witnesses; and the cost of plaintiff's copy of the deposition of Dr. Woodrich, who was deposed in Florida. "Although there is no express statutory authorization for the taxation of deposition expenses as costs, courts have generally held that costs of taking and transcribing depositions fits within [the ambit of 28 U.S.C. § 1920(2)]." *Pan American Grain Mfg. Co. v. Puerto Rico Ports Authority*, 193 F.R.D. at 38 (citing *Templeman v. Chris Craft Corp.*, 770 F.2d 245, 249 (1985)). The Court finds that the expenses itemized in attachment "A" relative to the

⁷ Plaintiffs' had filed a previous motion for costs (Docket No. 129), seeking a significantly higher amount of money, which was later amended as a result of defendant's motion (Docket No. 131).

⁸ Plaintiffs claim that the costs listed in the present motion are solely related to the case against defendant HIMA, since the case against Dr. Roldán settled shortly after the filing of the complaint.

depositions of Dr. Alonso Serrano Isern, Dr. José Vargas Cordero and Ms. Magaly Monegro totaling \$1,769.12 are entirely reasonable. In addition the cost of \$353.05 associated with copying Dr. Woodrich's deposition is also reasonable and appropriately documented. (See Docket No. 135, exhibit to attachment "A"). Expenses associated with translating documents into English, such as the \$276.25 incurred in the translation of the deposition of Magaly Monegro, are costs that a court may tax in its discretion under 28 U.S.C. 1920(6). See e.g., *Pan American Grain Mfg.*, 193 F.R.D. at 38 (citing *Ramos v. Davis & Geck, Inc.*, 968 F. Supp. 765, 783 (D.P.R. 1997)). The costs of charts used during trial, such as the \$120.00 utilized in this case, fits squarely within the purview of 28 U.S.C. § 1920(4), and as such will be allowed by the Court. Finally, the \$314.96 sought for the cost of the video presented at trial detailing a "Day in the Life of Baby Fabiola," admitted as a demonstration of the plaintiff's impairments, will be approved. See *Romero v. Unites States*, 865 F. Supp. 585, 594 (E.D. Miss. 1994) (allowing costs to be recovered for "day in the life video"). In sum, the Court finds that plaintiffs are entitled to recover a total of \$3,420.00 in costs.

CONCLUSION

In view of the aforementioned, the Court hereby **DENIES** defendant HIMA's motion for judgment as a matter of law. (Docket No. 130). HIMA's motion for a new trial and/or for remittitur is also **DENIED**. (Docket No. 130). Plaintiffs' amended bill of costs motion (Docket No. 135) is **GRANTED**, and plaintiffs are awarded a total of \$3,420.00 in costs.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 7th day of September
2004.

S/
HECTOR M. LAFFITTE
U.S. District Judge

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 04-2494

MARÍA YOLANDA
MARCANO RIVERA;
JORGE RODRÍGUEZ
MATOS; FABIOLA
RODRÍGUEZ MARCANO,

Plaintiffs-Appellees,

v.

TURABO MEDICAL
CENTER PARTNERSHIP
d/b/a HOSPITAL IN-
TERAMERICANO
DE MEDICINA AVAN-
ZADA,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Héctor M. Laffitte, U.S. District Judge]

ORDER.

September 6, 2005

Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard.

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc, it is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

APPENDIX D

IN THE SUPREME COURT OF PUERTO RICO

Marta Nieves-Cruz, in
representation of Angel
Luis Hernández-Nieves,

Appellees

v.

University of Puerto Rico;
Asociación de Garantía de
Seguros Misceláneos,

Appellants

Certiorari

2000 TSPR 78

CC-1998-876
Cons. AC-1998-47

Opinion of the Court issued by Associate Justice Mr.
Fuster – Berlingeri.

San Juan, Puerto Rico, on May 31, 2000.

We are called upon to resolve *inter alia* whether Law No. 98 of August 24, 1994, that included the University of Puerto Rico within the limits of liability of the State, is applicable retroactively.

I

Angel Hernández-Nieves was born on December 24, 1983, in the Carolina Area Hospital, which at that time was the property of the Commonwealth of Puerto Rico and was

used as a teaching center for the University of Puerto Rico's School of Medical Science.

The obstetricians who attended Mrs. Nieves, Angel's mother, had not had any prior contact with her and, therefore, did not know the medical history of her pregnancy.

When she arrived at said hospital, Mrs. Nieves presented the symptoms of a pre-term delivery that would require the care of specialists of the highest experience possible, but she was attended by an intern in his first year of training. When the patient arrived at the Hospital, she was sent to the delivery room and no measures whatsoever were taken to attempt to postpone the delivery.

During the course of the birth, Mrs. Nieves was administered two doses of Demerol and one dose of a drug called Vistaril, that duplicated the effect of the Demerol. This combination of drugs caused the depression of the premature infant's respiratory system, causing him difficulty to breathe during the birth process. He also suffered a decrease in the fetal heartbeats. The infant was born very depressed,¹ his color was not healthy, and his vital signs were not normal. He had evident traces of damage caused by hypoxia (lack of oxygen in the blood). Due to this condition, the infant need to be intubated immediately, but the people in charge of doing this took 7 or 8 minutes before doing this task, while the baby was not breathing. At the present time, the minor Hernández-Nieves suffers severe permanent and disabling injuries, including physical disability and mental retardation.

1 In its findings of facts, the Court of First Instance indicated that "depressed meant that his vital centers were not functioning correctly."

On December 30, 1993, Mrs. Nieves filed a complaint with the then Superior Court, Carolina Part, on behalf of her son, against the University of Puerto Rico and other codefendants. After the pertinent procedural stages, the Court of First Instance entered Judgment on August 15, 1997, and granted the complaint filed against the University of Puerto Rico and the Asociación de Garantía de Seguros Misceláneos (*Miscellaneous Insurance Guaranty Association*) (on behalf of the interests of the University's insurer, the Corporación Insular de Seguros). It ordered the payment of \$750,000 in favor of the minor plaintiff "for the concept of physical damages, past, present and future, his permanent disability. . . ."; \$325,000 "for the concept of impairment to the potential for generating income"; \$2,900,000 "for all of the future expenses for the care, transportation, meals, loss of income, and other miscellaneous special expenses. . . ." In addition, it imposed on the University of Puerto Rico the sum of \$10,000 for attorneys' fees. The liability of the Asociación de Garantía de Seguros Misceláneos was limited to the sum of \$150,000.

Both the University of Puerto Rico and the Asociación de Garantía de Seguros Misceláneos filed several appeals with the Circuit Court of Appeals. Said forum consolidated those appeals and after having held an oral hearing on August 25, 1998, it entered judgment whereby it modified the judgment of the Court of First Instance to the effects of deducting the sum of \$325,000 from the \$2,900,000 item.

Both the Asociación de Garantía de Seguros (Association) and the University of Puerto Rico (U.P.R.) appeared before us through separate appeals. The Association presented the following issues:

First error:

The Circuit Court of Appeals erred in affirming the judgment of the Court of First Instance even though the rela-

tionship between the physicians and the university was not established for lack of evidence thereon.

Second error:

The Circuit Court of Appeals erred in affirming the judgment of the Court of First Instance in the absence of evidence that the university's negligence was the adequate and efficient cause of the damages.

Third error:

The Circuit Court of Appeals erred in applying the doctrine of appellate abstention when it should have examined the expert evidence and adopted its own criterion in the appreciation thereof.

Fourth error:

The Circuit Court of Appeals erred in affirming the decision of the Court of First Instance regarding the non application of Law 98 of August 24, 1994, to this case and ignoring the clear disposition of the legislation on the subject.

Fifth error:

The Court of First Instance erred in affirming the amounts of damages granted by the Court of First Instance departing from the standards established by the Supreme Court for the evaluation thereof.

Sixth error:

The Court of First Instance erred in affirming the imposition by the Court of First Instance of the payment of attorneys' fees ignoring the criteria established on the matter by the Supreme Court.

On its part, the University of Puerto Rico stated that the Court of First Instance had committed the following errors:

"A. It erred in not extending to the University the limits of liability that are applicable to the Commonwealth of Puerto Rico.

B. It erred in applying and extending the doctrine of Collateral Source.

C. It erred in granting indirectly to plaintiff loss of income.

D. It erred in analyzing the other items of damages granted."

On January 15, 1999, we issued both writs and ordered their consolidation. On May 13, 1999, the U.P.R. filed its brief. On May 14, the Association requested that we adopt its petition for appeal as its brief, to which we agreed. On June 8, 1999, appellee filed its brief. With the benefit of the appearances mentioned, we proceed to resolve.

II

Is Law 98 of August 24, 1994 applicable retroactively?

The cited Law 98 amended Art. 41.050 of the Insurance Code, 26 L.P.R.A. § 4105, for it to provide, in pertinent part, as follows:

"In any civil action in which damages are claimed of the University of Puerto Rico, in any case in which a judgment is entered for acts that constitute medical hospital malpractice committed by the employees . . . of the School of Medical Science . . . , or when a judgment is entered for acts that constitute guilt or negligence directly connected with the operation by the University of Puerto Rico of a health care institution, the University will be subject . . . to the limits of liability . . . that §§ 3077, *et seq.* of Title 32 impose to require

liability of the Commonwealth of Puerto Rico under similar circumstances.”

In the instant case, both the lower court and the Circuit Court of Appeals panel determined that the cited provision was not applicable here in view of the fact that it had been approved and entered into effect in 1994 while the cause of action in question had arisen in 1983, and the filing of the corresponding complaint in 1993, both prior to said provision entering into effect. Both petitioners challenged these judicial findings, and they alleged before us that the legislative intent was that said provision be applied retroactively. In another case that is not before our consideration here, another panel of the appellate forum held that the provisions at issue had a retroactive effect.²

Article 3 of the Puerto Rico Civil Code, 31 L.P.R.A. § 3, provides that:

“The laws shall not have a retroactive effect, *if the contrary was not expressly provided.*”
(Emphasis ours.)

The principle of *non-retroactivity* found in said Article 3 is of the fundamental legal postulates, that goes back to Roman law and that has been adopted in all of the codes of the countries that have a civil tradition. F. Puig-Peña, *Compendia de Derecho Civil Español (Compendium of Spanish Civil Law)*, Madrid 1976, Tome I pp. 124-130. Of profound lineage in the theory of the law, one of its justifications lies in the natural law, that repudiates that a standard may have effect at a time in which it did not exist. *Id.* Or, as Hans Walter Scheerbarth has stated, “that law that purports to be applica-

² *Montanez-Lopez v. U.P.R.*, Judgment of November 9, 1998, KLAN 98-113.

ble to a case that has occurred before the law entered into effect is a ghost of the police State," cited by Suárez-Collia in *El Principio de Irretroactividad de las Normas Jurídicas* ("The Principle of Non-retroactivity of Legal Standards") Madrid, 1994, pp. 48-49. Pursuant to this principle, the retroactivity of a standards is justified only in isolated cases, "by determined and supreme circumstances," that have been concretely established by the legislator. Puig-Peña, *supra*.

In civil doctrine, it has been justified that the legislator gave retroactive effect to certain laws when that is necessary for the transformation and progress of past situations that should be eliminated for reasons of justice or of general interest. *M. Albaladejo, Comentarios al Código Civil* (Commentaries on the Civil Code), Madrid, 1978, Tome I, pp. 74-76. This deals mainly with standards of public law, regarding social ills that should be remedied, which is why it is deemed that the legislator should not be tied to an inflexible standards of non-retroactivity. With respect to laws regarding private law, however, the criterion of the doctrine is that these must never be retroactive. Puig-Peña, *supra*, p. 129.

It is for all of the foregoing that we have repeated held that intention of the Legislative Assembly of giving retroactive effect to a law, *because it is an exceptional act*, "must appear expressly or arise clearly from the statute", *Vázquez v. Morales*, 14 D.P.R. 822, 831 (1983); *Guardiola-Pérez v. Morán*, 114 D.P.R. 477 (1983); *Atilas, Admin. v. Industrial Commission*, 77 D.P.R. 511, 512 (1954); *Echeandía v. Alvarado*, 65 D.P.R. 230, 235 (1945); *Baiz v. Horse Racing Commission*, 63 D.P.R. 483, 487 (1944), *López v. South P.R. Sugar Co.*, 62 D.P.R. 238, 242 (1943); *Hernández-Usera Ex parte*, 52 D.P.R. 120, 134 (1937). Retroactivity should have been expressed affirmatively in the text of the statute. *Monllor & Boscio, Sucrs. v. Sánchez-Bonet, Treas.*, 61 D.P.R. 67, 73 (1942). If the new legislative provision does not clearly and unequivocally express that it will have a retroactive ef-

fect, then the law applicable to the issue is *the one that was in effect when the facts gave rise to the cause of action occurred*. See, *Arce-Oliveras v. Commonwealth of P.R.*, 122 D.P.R. 877, 879 (1988); *Kobler v. Escambron Development Corp.*, 85 D.P.R. 743, 744 (1962); and *Atilas, Admin v. Industrial Commission, supra*, at pp. 512. On few occasions when we have departed from these imperious norms, that has been because the legislative purpose was obvious evident, in cases in which the retroactive application of the law in question was necessary to correct a serious social ill or to do justice to certain petitioners. See, *Vélez v. Sec. of Justice*, 115 D.P.R. 533 (1984); *Díaz v. Sec. of the Treasury*, 114 D.P.R. 865 (1983), and *Warner Lambert Co. v. Superior Court*, 101 D.P.R. 378 (1973). Norms regarding private law were not involved in any of these.

In the instant case, the statute in question does not provide any manner that the new provision that limits the economic liability of the U.P.R. in cases of medical malpractice is to have retroactive effect. Certainly, it does not provide this expressly, nor does it appear clearly in any other manner. Perhaps due to the foregoing—due to the absence of a clear expression on the subject in the statute itself—defendants did not raise the issue of the purported retroactivity of said provision in their answer to the complaint, which occurred on February 15, 1995; or in pretrial conference report of December 30, 1996, although by that date more than 28 months had transpired since said law had been enacted.³

3 Appellee had stated that since petitioners never amended their answers to the complaint to raise, as an affirmative defense, the issue of retroactivity, such defense should be deemed waived. They seek support, *inter alia*, in our holding in *Insurance Co. of P.R. v. Superior Court*, 100 D.P.R. 405 (1972), and in *Insurance Co. of P.R. v. Ruiz*, 96 D.P.R. 175 (1968). In view of our decision

Petitioners have alluded to the legislative history of Law 98 in question to mention that at the public hearing regarding the corresponding Senate Bill, the President of the U.P.R. testified in favor of giving retroactive effect to said law. They have indicated that said official emphasized the need to make the proposed Law 98 applicable to the numerous judicial claims that had already been filed against the U.P.R. It appears, however, that the allusion to the legislative history shows the contrary to what alleged. *It only reflects that although the legislator had before him the issue of retroactivity, he did not provide for such effect in any clear manner.* If a legislative intent of definitive retroactivity did exist, in view of statements such as the one made by the President of the U.P.R., the logical thing would have been to include in Law 98 a simple sentence expressing such intention. As has been done before, a provision would have been included that read thus:

“This law will begin to govern immediately after its enactment, and its provisions shall be applicable to causes of action covered by its provisions that are pending before the Court of First Instance of Puerto Rico as of the date of its enactment.” See, *Rodríguez-Ríos v. Commonwealth of P.R.*, 116 D.P.R. 102, 104 (1985).

But said law says nothing on the subject. It merely orders that it enter into effect immediately, without stating anything that indicates textually or in any other clear manner that the new provision would be applicable retroactively, as

[Footnote continued from previous page]

in this opinion as to the issue of retroactivity, it is not necessary to resolve this stance.

would be required for such drastic provision to have effect also with respect to lawsuits pending when said law was enacted.

It is also evident that the exceptional circumstances of *Vélez v. Sec. of Justice*, *supra*, *Warner Lambert Co. v. Tribunal Superior*, *supra*, or *Díaz v. Sec. of the Treasury*, *supra*, are not present. Taking this into account, since Law 98 does not order its retroactive application expressly, nor is that in any way clear in the statute, we resolve that the provision in question is only applicable *prospectively* to cases whose causes of action have arisen while it was already in effect.

III

The Appreciation of the Evidence

Having already established the main issue of the instant case, we should now proceed to examine the other issues presented to us by the petitioners in the captioned case. Several of them allude to purported errors committed by the lower court in its appreciation of the evidence. Let us see.

A. The Association alleged, in the first place, that plaintiffs-appellees had not established that the U.P.R. was liable for the actions of the physicians who intervened in the birth at issue herein, as required by Article 1803 of the Civil Code, 31 L.P.R.A. § 5142.

This allegation is lacking in merit. To begin with, it must be mentioned that the U.P.R. has at no time denied that it was its medical personnel who intervened in Mrs. Nieves' delivery. It is extremely significant that the main defendant in such a controversial lawsuit as this one has not stated that the actions of the physicians mentioned was not its responsibility. That allows the inference that these physicians were part of its personnel. Moreover, in the February 15, 1995, answer to the complaint, the Asociación de Garantía de Seguros Misceláneos admitted in its entirety the first paragraph of the complaint against the U.P.R. and the Commonwealth of

P.R., in which it was alleged that Mrs. Nieves had given birth on December 24, 1993, in the Carolina Area Hospital, which was owned and was being operated by those defendants. It admitted, then, the relationship of the U.P.R. with the delivery in question.

On the other hand, it is evident from the documents that are in the records that the lower court considered, addressed at a hearing, and granted a request for summary judgment dismissing the complaint in question as to the Commonwealth of P.R. That occurred because the Commonwealth of P.R. was able to prove that the physicians whose alleged negligence had caused plaintiff's damages *were not its employees but were employees of the U.P.R.* Both the Association and the U.P.R. were parties in this proceeding and neither of them challenged the Commonwealth of P.R.'s request or the decision of the lower court. In this manner, then, the bond of the U.P.R. with the physicians in question was judicially established.

Finally, the record contains the contract subscribe by the U.P.R. with the Department of Health and the Carolina Area Hospital pursuant to which the Hospital obtained the services of the U.P.R. School of Medical Science. Pursuant to said contract, the U.P.R. School was to provide *all* of the professional services to *all* of the medical-indigent patients of the Hospital, as was Mrs. Nieves.

In light of all of the foregoing, it is clear that the physicians who attended Mrs. Nieves in the instant case constituted personnel of the U.P.R. School, thus the latter is civilly liable for their acts. Therefore, the error alleged was not committed.

B. Through its second statement of error, the Asociación de Garantía de Seguros Misceláneos stated in the instant case that it had not been proven that the University's negligence was the adequate cause of the damages suffered by plaintiff. In its third statement it alleged that the Circuit

Court of Appeals had not exercised its authority to review by not adopting its own criterion in the appreciation of the expert evidence.

Since both statements are intimately related, we will discuss them together. An examination of the testimony of the experts presented by plaintiff, as appears from the transcript of the evidence that is in the record, clearly shows that the negligence of the doctors who attended the birth was the cause of the damages the minor suffered. Dr. Bernard Nathanson, who was qualified as an expert in obstetrics-gynecology with objection by defendant, identified in his testimony all of the deviations incurred by the physicians in question from the accepted standards recognized by the medical profession in the treatment of Mrs. Nieves' delivery. Dr. Nathanson's testimony, which was corroborated by the testimony of Dr. Allan Hausknecht, a neurologist, particularly refers to the lack of proper medical attention received by the minor's mother during the delivery, and to the inadequate care provided to the new both in the delivery room.

After listing and explaining each and every one of the deviations from the standards of care in this case, Dr. Nathanson concluded with a reasonable degree of medical certainty that there was medical negligence in the handling of the delivery, in the birth, and in the resuscitation of the newborn. He emphasized that during the course of the delivery the mother was administered two doses of the narcotic drug Demerol, supplemented with a dose of the drug Vistaril; and that the combination of Demerol-Vistaril had the functional effect of doubling the effect of the Demerol. He indicated that so much Demerol adversely affected the infant's respiratory system. The expert opined that Mrs. Nieves should not have been given Demerol, due to her pre-term high risk state, and certainly never such a high dose as the one that was administered and, much less, accompanied by Vistaril.

Pursuant to the expert testimony mentioned, the Court of First Instance concluded that it had been proven that there was medical negligence in the handling of the delivery, of the birth, and of the immediate resuscitation of the infant. It further determined that had the negligence alluded not occurred, the infant would not have been born depressed, it would not have suffered from 7 or 8 minutes of hypoxia after the delivery, in addition to the period of time prior to the birth during which the fetal heartbeats had decelerated, which also indicated that there was a significant period of time of hypoxia. The Court of First Instance finally determined that the testimony of Dr. Hausknecht had not been contradicted. This expert had concluded that a causal relationship existed between the total permanent disability of the minor plaintiff and the negligent acts and omission of the physicians who attended the delivery.

It is evident from all of the foregoing that the lower court had sufficient grounds in the evidence presented to make the findings it made. We will not interfere with the appreciations of the facts alluded.

IV The Amounts

Petitioners also challenged before us the amounts granted to plaintiff by the lower court. They presented diverse positions on the subject which we must examine. Let us see.

A. The University of Puerto Rico stated that a considerable part of the \$2,900,000 judgment consisted in future expenses for care, therapies, transportation, meals, and other similar miscellaneous expenses that the state of Florida, where plaintiff had to go to live, has been paying plaintiff. For this reason, the University alleged that it has been ordered to compensation certain expenses in which plaintiff might never incur.

In our jurisdiction we have already adopted the doctrine of collateral source, pursuant to which, *as a general rule*, the one who causes a damage is barred from deducting from the amount of the compensation that has been imposed on it the compensation or benefits that the affected party has received from a third person or entity. *Futurama Import Corp. v. Trans Caribbean*, 104 D.P.R. 609 (1976). This doctrine is based on the principle that he who causes harm due to his negligence must not benefit from what the affected party has received due to the liberality of others or from public services that the community extends to those in need. H.M. Brau del Toro, *Los Daños y Perjuicios Extracontractuales en Puerto Rico (Extra-contractual Tort Damages in Puerto Rico)*, Publicaciones J.T.S. 1980, p. 449. This concept has ample support in civil doctrine, that is also based on the fact that the relationship of the third party that grants benefits to the affected party is totally different from that which the latter has with the one who caused his damages. The one who causes the damage is obligated to compensate while that which is granted by the third party is contributed by another title. Santos-Briz, *La Responsabilidad Civil (Civil Liability)*, Madrid, 1993, pp. 275-276; Puig-Brutau, *Fundamentos de Derecho Civil (Foundations of Civil Law)* Barcelona, 1983, Tome II, Vol. III, p. 198; Mazeaud, *Derecho Civil (Civil Law)*, 1960, Parte II, pp. 62-63. Orgaz, in his classic *Paper El Daño Resarcible (Compensable Damages)*, Córdoba, 1980, at p. 191, has stated it in the following manner:

"Sometimes, as a result of an illicit act, the person affected is assisted with donations from persons or philanthropic institutions or with the product of public subscriptions. *There is unanimity of opinions in the sense that the author of the illicit act may not purport to have these benefits deducted from the amount that it must pay as compensation; these are entirely fortuitous benefits that have*

no actually causal nexus with the act of the responsible party. (Emphasis ours.)

In *Futurama Import Corp. v. Trans Caribbean, supra*, however, we were clear in that the doctrine of collateral source must not be applied mechanically. Concerned about the problems of the so-called "double compensation" or the accumulation of compensations, we indicated that in each case the origin and purpose of the collateral benefits in question must be examined, to then decide whether or not it will be deducted from the compensation that must be paid by the one who caused the harm.

In the instant case, the collateral benefit that the state of Florida has provided to plaintiff does not constitute a double compensation, as perhaps might occur if plaintiff had received some payment as an insured through an insurance policy issued to compensate similar damages. The benefits that plaintiff has received arise from a social policy of the state that seeks to help any disabled person who lives in the State, due to his mere condition as such, that has nothing to do with the reparation of damages suffered due to a medical malpractice. These are benefits *of an uncertain duration*, that depend on the funds that the State has available for those purposes, of the political will to continue granting them that exists in that State, and that the plaintiff continues residing there. To resolve as petitioner intends would mean to let her benefit from what the Florida community has provided, not for her but for its disabled residents, and that way find itself released for free from an obligation due to circumstances that are totally foreign to it. It would also mean condemning the affected party to being inexorably the recipient of public benefit outside of his country, without being able to find help himself in private institutions of his choice. Petitioner, therefore, is not right. The error was not committed. -

B. The U.P.R. also stated that the appellate forum did not adequately correct the error that the lower court suppos-

edly committed in granting plaintiff compensation for "loss of income" the same time as ordering "impairment of the potential to generate income." According to petitioner, when the Circuit Court of Appeals ordered that \$325,000 be subtracted from the \$2,900,000 that the lower court granted "for all the future expenses of care, transportation, meals, loss of income, and the other special miscellaneous expenses," said forum sought to correct the problem of *duplicity of items* that supposedly arose from the fact that the Court of First Instance had also granted to plaintiff a separate item of \$325,000 "for the concept of impairment in the potential to generate income." The U.P.R. adduced that what that decision of the appellate forum did was in effect to eliminate the item corresponding to the impairment mentioned, while leaving in effect the erroneous and uncertain item of loss of income, that usually was greater than the one that was granted for the impairment mentioned.

In its judgment, the appellate forum indicated that it did not understand why the lower court had included the concept of "loss of income" in the item mentioned. It indicated that plaintiffs themselves had not claimed loss of income. Pursuant to *Ruiz-Santiago v. Commonwealth of P.R.*, 116 D.P.R. 306 (1985), it further held that such item was legally unwarranted in a case such as the instant case. The appellate court then alluded to the purported difficulty in correcting the alleged error of the lower court since the lower court had not granted a specific value to the loss of income, thus it lacked "certain specific parameters" on the matter that would allow it to correct the purported error. On the basis of the foregoing, the Circuit Court of Appeals provided, *without anything further*, that the sum of \$325,000 that were granted for impairment of the potential to generate income should be deducted from the \$2,900,000.

There is no doubt that in the instant case plaintiff could not be granted an item for loss of income since it had never

received income derived from a job. Absent a prior history of compensated activity, compensation for the concept of loss of income was unwarranted. *Ruiz-Santiago v. Commonwealth of P.R.*, *supra*. The appellate forum correctly determined this aspect of the question alluded. If the lower court had in effect granted some compensation for the concept of loss of income, it should be eliminated as unwarranted.

But it turns out that the lower forum really did not grant such compensation. If the text of the judgment *a quo* is carefully examined, it appears clearly therein that the court did not consider at all the issue of loss of income; and that *the only mention* that appears on this concept on the final page of the judgment, of only two words, must have been a typographical error. The Court of First Instance did dedicate two pages of the judgment to discussing the issue relative to the impairment of the potential to generate income, and its basis therefor was our fundamental decision in *Ruiz-Santiago v. Commonwealth of P.R.*, *supra*. Then it examined the issue relative to the expenses for medical treatment special care that the minor would have because he was permanently disabled. On this matter, it indicated the following:

"The evidence has also shown in an uncontroverted manner that . . . the minor will need constant and permanent special care during his life, having placed the Court in a condition to evaluate these special items through the reasonable uncontradicted estimate of Dr. Allan Hausknecht. Dr. Hausknecht testified that the cost of care and treatment in these cases is nationally the same. He indicated that the average cost would be between \$50,000 and \$60,000 per year until the age of 16 or 17; between \$70,000 and \$75,000 per year between the ages of 17 and 25, and of \$60,000 per year

when he is institutionalized for not having parents or another close relative to take care of him. . . . In light of the foregoing, the Court finds reasonable not granting compensation for past care and treatment not incurred and *that these must be granted as of the judgment using the lower annual sum of \$50,000, projected up to the age of seventy. Therefore, on the basis of this, plaintiff is entitled for these concepts to a global sum of TWO MILLION NINE HUNDRED THOUSAND DOLLARS.*" (Emphasis ours).

From the foregoing, it is evident that the challenged item of \$2,900,000 did not include at all compensation for loss of income. It is also evident that both petitioner and the appellate forum were mistaken in understanding that said \$2,900,000 item had included in an undetermined manner the compensation for various damages without specifying the concrete amount of each one. This item, as we have seen, expressly referred *only* to the payment of future expenses for medical treatment and care of the disabled minor on the basis of \$50,000 annually until the age of seventy (70).⁴ That is why, the error that the appellate forum did commit was the one of ordering the reduction of \$325,000 from the mentioned item. The court considered that with that reduction the problem of duplicity of items was averted, but since that

4 The Court of First Instance did commit an error in calculation. At the time the judgment was entered, the minor plaintiff was 13 years old, therefore he had 57 years left to reach the age of 70. That is why, on the basis of \$50,000 per year, the total amount ~~should~~ be \$2,850,000 and not \$2,900,000 as said forum provided.

problem really did not exist, the reduction provided was unwarranted.⁵ The appellate forum erred in ordering it.

C. Finally, petitioners challenged as excessive the various amounts granted to plaintiff by the lower court and ratified by the appellate forum. They both indicated that the items granted were very high and higher than the ones that have been judicially granted in similar cases.

On numerous occasions we have indicated that the judicial endeavor of estimating and appraising the damages in cases such as this one is difficult and distressing, since a system of accurate computation does not exist that allows us to reach an exact result with which all of the parties will be satisfied and pleased. *Blás v. Hospital Guadalupe*, Opinion of the Court of June 30, 1998, 146 D.P.R. ___, 98 J.T.S. 101; *Rodríguez-Cancel v. A.E.E.*, 116 D.P.R. 443 (1985); *Urrutia v. A.A.A.*, 103 D.P.R. 643 (1975).

⁵ It was unwarranted, also, for another reason. If the appreciation of the appellate forum had been correct that the compensation purportedly granted by the lower court for loss of income was unspecified, because it was included with others, then in light of such circumstance, what the appellate court should have done was return the case to the Court of First Instance for said court to itemize the particular amounts corresponding to the various damages supposedly included in the \$2,900,000 item, to then eliminate the one pertaining to loss of income. The decision of the appellate forum of reducing from said item an amount equal to the one granted for impairment of the potential to generate income would have been valid only if such amount had been equal to the one supposedly granted for loss of income. But the appellate forum did not have any basis to assume that those amounts were equal, thus, what should have been done was to order the itemization.

It is also a reiterated principle that this Court will not intervene in the decision on the estimation of damages issued by lower courts, unless the amounts granted are ridiculously low or exaggeratedly high. *Blás v. Hospital Guadalupe, supra*; *Rodríguez-Cancel v. A.E.E., supra*; *Valldejully-Rodríguez v. A.A.A.*, 99 D.P.R. 917 (1971).

In the instant case, the Court of First Instance granted the following amounts:

(a) \$750,000: "for concept of past, present, and future physical damages, his permanent disability and other damages mentioned above"

(b) \$325,000: "for concept of the impairment of the potential to generate income"

(c) \$2,900,000: "for all future expenses for the care, transportation, meals, loss of income, and other miscellaneous special expenses mentioned above that due to the disability [of the plaintiff] must be incurred"

(d) \$10,000: "for concept of attorneys' fees."

As can be seen, the total amount granted to plaintiff in the judgment adds up to \$3,985,000, which is substantially higher than what we have granted in cases similar to this case. It must be taken into account that the sum in question was granted as compensation for the damages suffered only by the minor Angel Hernández-Nieves. His mother, who appeared on behalf of her son, did not claim compensation for her own sufferings.

Some years ago we faced a situation very similar to the one in the instant case. In *Riley v. Rodríguez de Pacheco*, 119 D.P.R. 762 (1987), a newborn suffered serious cerebral damages due to the malpractice of the physicians who attended the delivery. Those damages made her permanently disabled physically and intellectually. Since the minor could not lead a normal life, she would need treatments, care and

assistance from other persons during her entire existence. The Court of First Instance granted \$800,000 for physical and mental damages, which we considered exaggerated. We reduced them to \$400,000 and indicated that:

“... taken to real extremes, the mental and physical sufferings are quantifiable *ad infinitum*. Without certain reasonable limits, the compensation would cease to have the characteristic of compensation to become punitive.”

In the instant case, pursuant to the decision in *Riley v. Rodríguez de Pacheco, supra*, the \$750,000 item for physical damages granted by the lower court should be reduced. Following the parameters of the precedent mentioned, we deem reasonable the sum of \$375,000.

With respect to the items granted for the concept of impairment of the potential to generate income and for the concept of future expenses for care and treatment, we find it evident that a highly speculative element exists therein. Both are based on the assumption that the minor, despite the severe physical disability and mental retardation that he suffers, will live at least until he is seventy (70) years old. Thus, following again the precedent in *Rodríguez de Pacheco, supra*, we deem reasonable reducing those items of \$325,000 and \$2,900,000 to the sums of \$162,500 and \$1,450,000, respectively. Pursuant to the foregoing, the total compensation for the three items at issue would total \$1,987,500.

V

— The Attorneys' Fees

The Asociación de Garantía de Seguros Misceláneos indicates to us that defendant had not incurred in temerity that would justify the judgment of \$10,000 in attorneys' fees that was imposed on it by the forum *a quo*.

The statement is without merit. The Court of First Instance that the temerity incurred by the University was pat-

ent, since it had denied facts of which it was aware or that were easily verifiable. In its answer to the complaint, the U.P.R. denied all its liability, the minor's injury and its disabling nature, and other similar issues, from which the temerity is clearly evident. The error was not committed. Since the University of Puerto Rico, being a public corporation, is not exempt from the payment of attorneys' fees due to temerity, as the Commonwealth of P.R. is under Rule 44.3(b) of Civil Procedure, the payment as imposed by the Court of First Instance is warranted. See, *Rodríguez-Cancel v. A.E.E.*, 116 D.P.R. 443, 460 (1985).

VI

On the basis of the foregoing, judgment will be entered to modify the judgment of the appellate forum and to provide the following amounts as the total amount of the reparation due to the plaintiff:

- 1) for the concept of all physical damages\$375,000
- 2) for impairment of the potential to generate
income 162,500
- 3) for the concept of future expenses for care
and treatment 1,450,000
- 4) for attorneys' fees..... 10,000

JAIME B. FUSTER-BERLINGERI
ASSOCIATE JUSTICE

IN THE SUPREME COURT OF PUERTO RICO

Marta Nieves-Cruz, in
representation of Angel
Luis Hernández-Nieves,

Appellees

v.

University of Puerto Rico;
Asociación de Garantía de
Seguros Misceláneos,

Appellants

Certiorari

2000 TSPR 78

CC-1998-876
Cons. AC-1998-47

JUDGMENT

San Juan, Puerto Rico, on May 31, 2000.

On the basis of the ground stated in the preceding Opinion, which is made to form a part hereof, judgment is entered modifying the judgment of the appellate forum, and the following amounts are provided as the total amount for the reparation due to the plaintiff:

- 1) for the concept of all physical damages\$375,000
- 2) for impairment of the potential to generate
income 162,500
- 3) for the concept of future expenses for care
and treatment 1,450,000
- 4) for attorneys' fees..... 10,000

So pronounced, mandated by the Court, and certified by the Clerk of the Court. All of the Justices participated by Rule of Necessity. Associate Justice Mr. Hernández-Denton

dissents with a written opinion, joined by Associate Justice Mrs. Naveira de Rodón and Associate Justice Mr. Corrada del Río.

Isabel Llompарт Zeno
Clerk of the Supreme Court

IN THE SUPREME COURT OF PUERTO RICO

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Certiorari

2000 TSPR 78

CC-1998-876
Cons. AC-1998-47

Dissenting Opinion issued by Associate Justice Mr.
Hernández Denton joined by Associate Justice Mrs.
Naveira de Rodón and Associate Justice Mr.
Corrada del Río

San Juan, Puerto Rico, on May 31, 2000.

Although we concur with the Opinion of the Court to the effects that Law No. 98 of August 24, 1994, 26 L.P.R.A. § 4105, has a prospective effect, we dissent from the majority decision to reduce the amounts for the concept of damages granted by the Court of First Instance. We understand that the Court of First Instance fairly and adequately appraised the damages suffered by the minor Hernández-Nieves, and there is no basis whatsoever in the file that justifies the reduction of those amounts from this appellate bench.

I.

In 1983, Marta Nieves-Cruz gave birth to Ángel Luis Hernández-Nieves at the Carolina Area Hospital.

Nieves-Cruz, on behalf of her son, filed a complaint for damages against the Commonwealth of Puerto Rico,⁶ the University Puerto Rico, and the Asociación de Garantía de Seguros Misceláneos. She alleged, in synthesis, that as a result of the negligent acts of the physicians who attended her during the delivery, the minor had suffered permanent injuries, that included physical disability and mental retardation.

After several procedural incidents, and the holding of the corresponding trial, the Court of First Instance granted the complaint. It ordered the University of Puerto Rico to pay the following sums:⁷

- (1) \$325,000 for concept of the impairment of the potential to generate income.
- (2) \$750,000 for concept of past, present, and future physical damages and the permanent disability of Hernández-Nieves.
- (3) \$2,900,000 for all future expenses for care, transportation, loss of income, and other miscellaneous special expenses.⁸

6 Subsequently, the Court of First Instance dismissed the claim with respect to the Commonwealth of Puerto Rico.

7 It found that the liability of the Asociación de Garantía de Seguros Misceláneos was limited to the sum of \$150,000.

8 We concur with the majority of the Court to the effects that the mention of loss of income within said item constituted a typographical error.

(4) \$10,000 for concept of attorneys' fees.

Defendants filed various petitions for appeal with the Circuit Court of Appeals, in which they alleged, among other things, that the amounts of damages granted by the Court of First Instance had been excessive. The appellate court modified the judgment entered by the Court of First Instance, to the sole effects of subtracting the sum of \$325,000 from the \$2,900,000 item.

Not content, defendant appeal before us questioning, among other issues, the amounts granted to defendant by the forum *a quo*. This Court, without anything further, reduces those amounts by half. For the reasons stated hereinbelow, we cannot ratify that decision.

II.

In our system of extra-contractual liability, the purpose of compensation of damages is to restore the plaintiff to the status he was in before the damage occurred, that is returning the things to their natural state. *Correa v. A.F.F.*, 83 D.P.R. 144 (1961). This reparation is called *reparación in natura* or *restitutio in integrum*. However, this is difficult, and many times impossible. Therefore, on many occasions one resorts to the alternative of repairing the damage through the granting of a sum of money that is established as an "equivalent" to the loss suffered. See, *Rodríguez-Cancel v. A.E.E.*, 116 D.P.R. 443 (1985); *Galib-Frangie v. El Vocerode Puerto Rico*, Res. on June 6, 1995, 139 D.P.R. __ (1995).

The appraisal of the damage constitute a fundamental element in our legal system. Granting insufficient amounts for the concept of damages suffered has the effect of reducing the civil liability to which illegal actions should be subject. Antonio J. Amadeo-Murga, *El Valor de los Daños en la Responsabilidad Civil (The Value of Damages in Civil Liability)*, Tome I, 1997, p. 31. On the contrary, an exagger-

ated appraisal would give rise to the punitive element, beyond our system of law. *Id.*

For the civil system to comply with its purposes, the courts must propitiate achieving the most reasonable balance between the damage caused and the compensation granted. *Id.* However, we recognize that the function of appraising the damage is extremely difficult, particularly when dealing with appraising non patrimonial damages or moral damages. *Blás-Toledo v. Hospital de la Guadalupe*, Res. on July 22, 1998, 98 T.S.P.R. 111.

The concern about the difficulty and complexity of appraising damages has been manifested by this Court repeatedly. Thus, in *Riley v. Rodríguez de Pacheco*, 119 D.P.R. 762 (1987), we indicated:

“The determination of a fair and reasonable compensation for the damages suffered [is] a task that would constitute a challenge even for a XXth century Solomon. [Cite omitted.] The human appreciation of the value of elements that are not ostensible and visible but intangible . . . is not exempt from a certain degree of speculation. We aspire to have all adjudications be reasonably balanced, that is, neither extremely low nor disproportionately high.”

The judicial endeavor of estimating and appraising damages is extremely complicated and distressing because “no table or electronic computer exists that gathers all of the elements and unarticulated premises that nurture the appraisal of human physical and mental pain, that allows us, through the application of some keys or the pressing of some buttons, to obtain a final appropriate result.” *Urrutia v. A.A.A.*, 103 D.P.R. 643 (1975).

The task of appraising the damage rests initially in the prudent, wise and reasonable discretionary exercise of the

judge of the facts spirited by a sense of justice and of human conscience. *Urrutia, supra*. The courts of first instance are in a better position than the appellate courts to make this evaluation. That is so since these courts are the ones that have direct contact with the evidence presented in the judicial process in the first instance. *Urrutia, supra; Blás Toledo, supra*.

Thus, pursuant to said standard of judicial abstention, this Court will not intervene with the estimation and appraisal of damages made by the courts of first instance unless the amounts are ridiculously low or exaggeratedly high. *Valldejuli-Rodríguez v. A.A.A.*, 99 D.P.R. 917 (1971); *Riley, supra; Rodríguez-Cancel, supra, Urrutia, supra*. Thus, the party who requests a modification of the amounts granted by the lower court is obligated to prove the existence of circumstances that make it meritorious to modify the same. *Rodríguez-Cancel, supra*.

It is pertinent to emphasize that, although it is true that in some cases we have made statements to the effects that the courts of first instance may use as a *guide or point of departure* the sums granted by this Court in similar cases,⁹ it is not less true that this is not a determining factor in the estimation of damages. Remember that no two cases are exactly alike; each case is distinguished by its own varied circumstances. That is why the decision issued in a specific case, in connection with the appraisal and estimation of damages, cannot be considered as a mandatory precedent for another case. *Toro Aponte v. Commonwealth P.R.*, Res. on January 31, 1997, 142 D.P.R. ____ (1997); *Velázquez Ortiz, supra; Rodríguez-Cancel, supra*. The appraisal responds to particular and

⁹ See, for example, *Velázquez-Ortiz v. U.P.R.*, 128 D.P.R. 324 (1991); *Molina-Caro v. Dávila*, 121 D.P.R. 362 (1988).

unique factors that do not lend themselves to an indiscriminate extrapolation between one case and another. The compensation granted to plaintiff must be considered pursuant to the particular facts of the case. *Toro-Aponte, supra*.

Now then, if a court takes into account as a point of departure past appraisals, which, we reiterate, do not constitute a mandatory precedent, it is its duty to update them. That is so because the "value" of money today is not the same as, let us say ten or twenty years ago due to the rise in the cost of living our society has experienced. See, *Rojas v. Maldonado*, 68 D.P.R. 818 (1948).

With this doctrinal background regarding the estimation and appraisal of damages in our system, it is pertinent to analyze the criteria that must govern such determination for each one of the specific items granted by the Court of First Instance in the instant case. Let us also examine whether those amounts are reasonable and adequate and if they find support in the evidence presented before the forum a quo.—

(A) Impairment of the Potential to Generate Income

In *Ruiz-Santiago v. Commonwealth of P.R.*, 116 D.P.R. 306, 310 (1985), we acknowledged, for the first time, the modality of loss of income called "impairment of the potential to generate income." This type of compensation is not aimed at substituting income (because the person had never received an income nor did he receive at the time of the damaging act) but to compensate through a global sum the frustrated potential to generate it. *Rodríguez-Cancel v. A.E.E.*, 116 D.P.R. 443 (1985). Such is the case when a disability is caused to a minor who had never received income, but who has in his favor the presumption that he would have been a person of normal conditions and that he would have earned what such person would earn. *Ruiz-Santiago, supra*; *Pate v. U.S.A.*, 120 D.P.R. 566 (1988).

We acknowledge that the quantification and determination of an adequate compensation in those instances entails certain complications since this type of compensation, as well as other types of damages, are not "immune to a certain degree of speculation." *Ruiz-Santiago, supra; Pate, supra*. However, we have stated that those difficulties cannot serve as an obstacle in our primary function of enforcing justice. *Id.* Thus, the estimation of this type of damage would depend on the consideration and pondering of several estimating factors, without committing to a rigorous mathematical formula. The final specific amount would be of "reasonable judicial approximation," since the governing criterion for the estimation of this type of damage is that of probability. *Ruiz-Santiago, supra; Publio-Díaz v. Commonwealth of P.R.*, 106 D.P.R. 854, 871 (1978).

In light of the absence of a prior history of compensated activity, the factors that must be taken into account, when fixing the amount for impairment of the potential to generate income, include the status of the minor at the time of the disability and its reasonable future projection. *Ruiz-Santiago, supra; Rodríguez-Cancel, supra; Pate, supra*. Other factors to be considered are: the type of family nucleus, the degree of stability in the home, age, prior physical and mental health condition; intelligence, his willingness, education reached, study habits, skills in school, talent, specific interests, training and developed skills, degree of maturity and experience. *Id.* The minimum wage laws, the average income in the various occupations and professional prevailing, and the retirement systems or average retirement age form part of the total picture. *Id.*

All of these factors and those additional ones that provide best elements of judgment, will serve the judge to illuminate his conscience and to evaluate and compensate globally and equitably the impairment of the potential to generate income. *Ruiz-Santiago, supra*.

In the appraisal of this type of patrimonial damage, the statistics and economic sciences that allow making certain projections serve as help. The judges, with the aid of experts in various areas, can make an educated and reasonable calculation of that patrimonial damage.

In the instant case the propriety of the item of impairment of the potential to generate income is unquestionable. It is an uncontroverted fact that the physical and mental disability of the minor Hernández-Nieves will impede him from having a job that will allow him to generate income.¹⁰ The presumption that he would have been a person of normal conditions and that he would have earned what such person would earn operates in his favor.

The court of first instance, when fixing the sum of \$325,000 for the item of impairment of the potential to generate income, took as a point of departure the report of expert economist Dr. Jorge Freyre, which was presented by plaintiff. Special emphasis should be given to the fact that this report was admitted into evidence *without opposition from defendants*.¹¹ *Nor did defendants contradict said report.*

In making the calculation, Dr. Freyre considered a life expectancy of 70.26 years¹² and he took into account the factors outlined in *Ruiz-Santiago, supra*. Dr. Freyre provided

10 This conclusion finds support in the testimonies of the experts Dr. Agustín García and Dr. Allan Hansknecht.

11 Judgment of the Court of First Instance, p. 12.

12 This life expectancy is in harmony with the testimony of expert Dr. Allan Hausknecht on the mortality of persons who suffer conditions similar to those of Hernández-Nieves. Judgment of the Court of First Instance, p. 12; T.E. Testimony of Dr. Allan Hansknecht, p. 30.

the court with two alternatives in connection with the calculation of the item of impairment of the potential to generate income. On the one hand, he concluded that the results of the calculation were \$325,000 if they took as the basis the probability of employment of the universe of males in Puerto Rico. The impairment of the potential to generate income would rise to \$500,000 if they took into consideration the employment history of the minor's father. The Court of First Instance, in exercising its discretion, in evaluation the alternatives offered, chose *the lesser* of the two, that is, it granted \$325,000, based on the most conservative calculation. This, despite the fact that, as we have seen, there were sufficient grounds in the evidence presented to grant a larger amount.

The court of first instance established the amount for the item of impairment of the potential to generate income pursuant to the criteria stated jurisprudentially by this Curia and pursuant to the evidence presented. Moreover, as we stated previously, it based its decision on the more conservative calculation.

Even so, the majority of this court reduced to half the item in question, that is, it reduced the amount from \$325,000 to \$162,500 with further analysis of the expert evidence and *not contradicted* by defendants. What objective criteria does this court have to contradict the ones offered by expert economist Dr. Freyre, that would allow us to evaluate the "reasonableness" of the appraisal that was made of this type of damage? None. There is nothing in the file, beyond defendants' allegations in a void that such amount is "excessive," that merits allowing the same to be reduced.

We consider, then, that the amount granted by the Court of First Instance of \$325,000 in concept of the impairment of

the potential to generate income, is fair and reasonable¹³ and finds support in the evidence considered by the forum *a quo*.

(B) Physical and Mental Damages

This Court considered as a "reasonable" amount for the concept of physical and mental damages suffered by the minor *Hernández-Nieves* the sum of \$375,000, even though the court of first instance granted double, that is, \$750,000. In evaluating the reasonableness of said item, this Court took as a point of comparison the case of *Riley v. Rodríguez de Pacheco*, 119 D.P.R. 762 (1987). This is because it is a case "similar" to the present case in view of the fact that there a newborn, due to medical malpractice of the physicians who attended the delivery, suffered permanent physical and mental disability.

On that occasion we considered reasonable the sum of \$400,000 in concept of physical and mental damages. We find it incredible that the majority would take as a point of departure the case of *Riley, supra*, which according to its own words is a case very "similar to the instant case," not to grant *at least* what was granted there, but to *reduce* the amount granted in the present case to a *lesser* amount (\$375,000) than that granted in *Riley, supra*.

There is more, thirteen (13) years after our decision in *Riley, supra*, and twenty-six (26) years after the facts that gave rise to that decision, this Court uses said case as a guide disregarding the fact that the sum granted therein undoubtedly must be updated. It is an undeniable reality that the

13 Said amount is reduced in real terms to an annual compensation of \$5,701 annually and of \$15.61 daily, which is in no way exaggerated or punitive, as defendants allege.

“value” of money today is not the same as thirteen (13) or twenty-six (26) years ago due to the rise in the cost of living.

It is interesting to emphasize that what constituted \$400,000 thirteen (13) years ago might constitute today an amount that surpasses one million dollars.¹⁴ The court of first instance, taking into account the current value of money, could have granted said sum, if it had used as reference the case of *Riley, supra*. However, once more it opted, in the reasonable exercise of its discretion, for a conservative calculation and granted the sum of \$750,000.

Even if we do not take as a guide the case of *Riley, supra*, as the majority of this Court did, we understand that the amount granted by the court of first instance for the concept of physical and mental damages suffered by Hernández-Nieves is not excessive or exaggerated. From a meticulous analysis of the statements of the experts, which merited the lower court’s entire credibility, it appears that Hernández-Nieves suffers, *among other conditions*, of cerebral palsy, strabismus, spastic diplegia, optic atrophy, and several types of anomalies related to the hip and legs. He is dependent for all of the daily tasks, that is, he depends on other persons, for example, for his care, feeding, cleanliness, dressing, and to go to his medical appointments and treatments.¹⁵

With respect to the moral damages, suffice it to say, as the sentencing judge indicated, that the physical disability of the minor assumes “a significant alteration of his family and affective life.” The minor “has suffered and will suffer ap-

14 Taking as a point of departure an interest rate of 8%, the exact calculation would be \$1,087,868. See, Kieso & Weygant, *Intermediate Accounting*, 8th Edition, 1994, p. 303.

15 See, Testimony of expert Dr. Allan Hausknecht, T.E. p.74.

prehension, hardships, humiliations, annoying and continuous treatments, sleeplessness, having to be submitted to delicate and unnecessary treatments."¹⁶

So that, in light of all of the foregoing, we consider that the court of first instance did not abuse its discretion in granting the sum of \$750,000 in concept of physical and mental damages suffered by Hernández-Nieves. Reducing said amount is not justified.

(C) Special Damages

Special damages are those disbursements or losses that specifically reduce the patrimony and that are a direct result of the injury. Herminio Brau del Toro, *Los Danos y Perjuicios Extracontractuales en Puerto Rico (Extracontractual Tort Damages in Puerto Rico)*, Tome I, p. 433. These include, among others, medical expenses, medications, hospitalization and convalescence expenses, special nurses, therapies, and any type of special assistance required. *Id.*

In the present case, the Court of First Instance granted a sum of \$2,900,000 in concept of special damages. In the complaint filed, claims were made for past and future expenses for transportation, meals, doctors, hospitals, and others that are still unknown but that will necessarily be incurred in the treatment and special care that Hernández-Nieves will require through the years.

The Court of First Instance determined the sum for said concept on the basis of an estimate made by expert Dr. Allan Hansknecht. This expert testified, among other things, that the average cost of care and treatment of persons with conditions similar to the ones that Hernández-Nieves has is from \$50,000 to \$60,000 from the first year to the age of 16 or 17;

¹⁶ Judgment of the Court of First Instance, p. 12.

between \$70,000 and \$75,000 from the age of 17 to 25 years; and of \$60,000 per year when he is institutionalized because he does not have his parents or another close relative to care for him.¹⁷

The court of first instance understand that it was reasonable to take as the basis the *lower* sum, that is, the one of \$50,000,¹⁸ even though it had reasonable grounds in the evidence to grant certain higher amounts, on the basis of the increase in expenses assumed by the growth of the minor. But there is more, the court of first instance calculated this amount taking as the basis the age of the minor *at the time the judgment was entered* (13 years old). It did not take into account in the calculation, *even though it could have done so*, the special expenses which had been incurred prior to entering the judgment. Even so, this Court decided to reduce said item from \$2,900,000 to \$1,450,000. In other words, it reduced the amount to half, without any justification. Again, we differ from such action.

III.

From the foregoing discussion we may include that the Court of First Instance, in determining the amount of each of the items of damages, examined *all of the evidence and the various alternatives that could be considered from this evidence*. Pursuant to its prudent judicial discretion, it always

17 See, Testimony of expert Dr. Allan Hausknecht, T.E. pp. 42-47.

18 The Court of First Instance multiplied said amount by the number of years that Hernández-Nieves had left to reach the age of 70. On the basis of \$50,000 per year, the total amount should have been \$2,850,000. However, the court of first instance granted \$2,900,000.

opted for the *most conservative and lowers* calculations. A careful examination of the file, including the records in the lower court, reveals that the decision and computation of the damages finds ample support in the evidence presented. We do not find any grounds that justify altering the amounts of damages.

In this case, the damages were not speculative, as the majority of this Court argues. The existence of the damages was proven and that their proximate cause was the actions or omissions of defendants. The decision as to the amount, even if it might be approximate, should be sustained if the calculation rests on a reasonable basis and not on whim or conjecture. The right to compensation should not be defeated only by the speculative nature that in some measure the calculation of damages supposes.

Nor do the amounts granted constitute a punitive measures, as this Court suggests. It is impermissible to interpret that, having proven certain facts, suffered certain damages, the compensation granted, although fair, if considered high, should be reduced under the veil that the same is "exaggeratedly high" or it constitutes a "punitive measure."

We concur with the Circuit Court to the effects that one must not lose sight of the fact that when compensating a damage we are not honoring anyone; we are not turning the poor into rich from one day to the next as if this was a game of lottery. *What we are really doing is justice trying to place the one who suffers in the position he would more or less be in had he not suffered.*

Because we understand that the Opinion of the Court commits a great injustice on a family that has already suffered a serious tragedy, caused by the professional malpractice of the doctors of the University of Puerto Rico, we dissent.

FEDERICO HERNÁNDEZ DENTON
ASSOCIATE JUSTICE

APPENDIX E

IN THE SUPREME COURT OF PUERTO RICO

Ivelisse Blás Toledo *et al.*,

Plaintiffs and appellees

v.

No. RE-89-40

Hospital Neustra Señora de la
Guadalupe; the Medical Staff of
Hospital Neustra Señora de la
Guadalupe; Dr. Gloria Santaella,
Universal Insurance Company,
and the Patient's Compensation
Fund Administration,

Defendants and appellants
the last three

Ivelisse Blás Toledo *et al.*,

Plaintiffs and appellees

v.

No. RE-89-43

Hospital Neustra Señora de la
Guadalupe *et al.*,

Defendants

Dr. José R. Hidalgo and Insurance
Company of North America,

Defendants and appellants

Review

Ivelisse Blás Toledo *et al.*,

Plaintiffs and appellees

v.

No. RE-89-44

Hospital Neustra Señora de la
Guadalupe and Corporación Insu-
lar de Segruos,

Defendants and appellants

Ivelisse Blás Toledo *et al.*,

Plaintiffs and appellees

v.

No. RE-89-45

Hospital de la Guadalupe, Dr. Fer-
dinand Menéndez *et al.*,

Defendants and appellants

Ivelisse Blás Toledo *et al.*

Plaintiffs and appellees

v.

No. RE-89-48

Hospital Neustra Señora de la
Guadalupe, Dr. Frederick A. Gon-
zález, Gloria Tancin de González,
the Conjugal Partnership consti-
tuted by the latter two, Anesthesia
Service III, Respiratory Care of
Puerto Rico, Inc., Gloria Ayala,
María Leguillow *et al.*,

Defendants and appellants

JUSTICE REBOLLO LÓPEZ delivered the opinion of the Court.

San Juan, Puerto Rico, June 30, 1998

In March 1980, Ivelisse Blás Toledo went to the office of pediatrician Dr. José R. Hidalgo to have her daughter Alicia Marie, *who was a little over a year old*, examined for *several health conditions*. The child was hospitalized with a diagnosis of gastroenteritis,¹ interstitial² bilateral bronchopneumonia,³ and respiratory allergy. The young patient was "discharged" eight days later. Two weeks later, the child was again admitted by the mentioned physician to a hospital; this time she had a severe tonsillitis.⁴ She was again discharged.

1 Gastroenteritis is an "inflammation of the stomach and the intestine." *Diccionario médico Teide* [275], [Barcelona], Ed. Teide (1988).

2 Interstitial means "relating to supporting tissue (connective tissues and vessels) surrounding an organ's noble element." [Marcel] Gamier and [Valery] Delamare, *Diccionario de los términos técnicos de medicina* [554], [Madrid,] Eds. Norma (1981).

3 A bronchopneumonia is an "affection anatomically characterized by the inflammation of the pulmonary parenchyma and of the bronchi. In general, it is secondary to an affection of the respiratory passages or to a general illness. It is caused by microorganisms of variable nature." Gamier and Delamare, *supra*, [at 130].

4 A tonsillitis is an "inflammation of the tonsils or amygdalae caused by a bacterial or viral infection. It causes pharyngeal pain, fever, and difficulty to swallow. If not treated adequately with antibiotics, streptococcus tonsillitis may turn into a rheumatic fever or a nephritis." *Diccionario médico Teide*, *supra*, at [606].

From that moment up to November 1981, Dr. Hidalgo [treated] the child for several affections and infections in the urinary and respiratory tracts and in the right ear.⁵

Despite the illnesses presented by the child, Dr. Hidalgo considered that Alicia was a normal child for her age and that her weight was average.

In view of the *constant* recurrence of colds affecting the child, Dr. Hidalgo *referred* her to Dr. Ferdinand Menéndez, an otorhinolaryngologist,⁶ who examined her in January 1981 and determined that Alicia did not need any treatment or medication, but *advised* the mother of the need to operate on the child to remove the amygdalae and adenoids if the tonsillitis recurred. Dr. Menéndez also determined that Alicia was not allergic to any medication. In June 1981, Dr. Hidalgo *again referred* Alicia to Dr. Menéndez, who, after examining her, scheduled an operation in the Hospital Nuestra Señora de la Guadalupe (hereinafter, the Hospital) for the month of October in order to remove the child's amygdalae and adenoids. The operation was put off twice *on Dr. Hidalgo's orders* because of the child's health problems.⁷ The

5 During this period, Dr. Hidalgo examined the child for different reasons, not only for routine vaccines, but also to treat her for pneumonia, pharyngitis, suspected urinary [tract] infection, infection of upper respiratory tract, wheeze, acute gastroenteritis, and a right ear infection. In addition, he ordered several laboratory tests, including throat cultures; all the cultures came out negative.

6 An otorhinolaryngologist is a physician specializing in ear, nose, and throat illnesses.

7 The operation was put off twice because the child presented symptoms of acute gastroenteritis, inflammation of the upper respiratory tract, a cold, and otitis media.

operation was finally scheduled for November 16, 1981; it was not until the very day of the operation that Dr. Menéndez examined Alicia again.

Several days before the operation, Blás Toledo visited Dr. Hidalgo, who gave her a document entitled "medical clearance" to be signed by her before the operation. The lower court concluded that Dr. Hidalgo "forged" the date on the document because, according to the judgment, the mentioned document could only be completed one day—24 hours—before the operation.⁸ The trial court concluded, in addition, that Dr. Hidalgo filled out a consultation sheet with information that Dr. Menéndez should have furnished and that he signed for Dr. Menéndez.⁹ The Superior Court further concluded, based on the expert evidence, *that at the time the medical clearance was completed, Dr. Hidalgo knew that Alicia did not meet the minimum indispensable requirements for an amygdalae and adenoids operation.*¹⁰ The Superior

8 It appears that the document in question was signed on November 15, 1981, but it was prepared and signed by Dr. Hidalgo on Saturday, November 14, 1981.

9 As indicated by the trial court, Dr. Hidalgo gave this document to Blás Toledo who would in turn deliver it to the Hospital for the pre-admission. The document regarding the alleged consultation between Dr. Hidalgo and Dr. Menéndez was prepared only by Dr. Hidalgo, who even filled out the parts or sections that concerned Dr. Menéndez.

10 Dr. Hidalgo himself admitted in the Court that Nelson's treatise, in his opinion "the pediatrician's Bible"—sets out the criteria to determine whether a child's tonsils should be removed. Confronted with the text, *he admitted* that Alicia Marie did *not* meet the criteria mentioned in said treatise. See, Vaughan, McKay, and Behrman, *Nelson Textbook of Pediatrics* (11th ed. 1979).

Court also found that up to that moment there had been no communication between Dr. Hidalgo and Dr. Menéndez regarding Alicia's case, specifically, regarding the operation.

On Sunday, November 15, 1981, Alicia was admitted to the Hospital, where Blás Toledo signed the necessary consent documents. That same day, "Doctor" Roberto Bengoa, a medical clerk, did a complete medical examination of Alicia; he diagnosed tonsillitis and adenoiditis.¹¹ However, the medical history sheet corresponding to the examination conducted that day was signed by Dr. Menéndez, as "attending physician," even though he had not performed any kind of examination on Alicia.¹² As pointed out in the trial court

11 "Doctor" Roberto Bengoa had been hired by the Hospital as physician, *but he did not have a license to practice medicine in Puerto Rico or abroad*. He had taken the first part of the Board examinations *but he had failed to pass them*. His duties at the Hospital consisted of drawing up the [medical] histories and carrying out the physical examinations of the patients in the third and fifth floors. In addition, on alternate Sundays, he did the pertinent examinations of the patients that would undergo surgery on the following day. This intervention with the patients was made without any supervision from a physician duly authorized to practice medicine in Puerto Rico.

12 In his trial court testimony, "Doctor" Roberto Bengoa admitted that the sheet in which he wrote down the medical history and mentioned the physical examination of Alicia Marie Santos Blás was dated Sunday, November 15, 1981. He also admitted that on that day he *did not* see or talk to Dr. Menéndez regarding this patient. Nonetheless, the medical record sheet is signed by Dr. Menéndez in his capacity as "attending physician."

judgment, there was no reasonable explanation for this discrepancy.¹³

That same day, Dr. Frederick J. González went to see the young patient to do a pre-anesthesia evaluation. He identified himself to Ivelisse Blás as the anesthesiologist who would be in charge of the child on the following day during the operation. However, he could *not* examine Alicia because she was asleep.

At approximately 8:00 a.m. on the following day, November 16, Alicia Marie—crying and calling her mother—was taken to the operating room while her mother stayed in the waiting room. Alicia Marie was received in front of operating room B by nurse anesthetist, María Leguillow, who took her to anesthesiologist Dr. Gloria M. Santaella. Nurse anesthetist Gloria Ayala de Ferrer, Dr. Santaella, a “scrub” nurse, and a “circulating” nurse were in operating room B. As determined by the trial court, the circulating nurse and the scrub nurse were Hospital employees, while the rest of the operating room staff, that is, nurse anesthetists Ayala and Leguillow, and anesthesiologist, Dr. Santaella, made up the anesthetist team and were employees of Dr. Frederick J. González.¹⁴

13 In his trial court testimony, Dr. Menéndez could not give a satisfactory explanation for this discrepancy in the medical history sheet. As indicated in the Superior Court judgment, the evidence shows that Dr. Menéndez did not see the patient or examined her on Sunday, November 15.

14 In 1981 and even before that date, there was a contract between the Hospital and Dr. Frederick González, by which the former was responsible for providing all anesthesiologists and nurse anesthetists for the Hospital anesthesiology services. Dr. Frederick González himself testified about the existence of the exclusive

Nurse Leguillow placed the child on the operating table and received instructions from Dr. Santaella to begin with the preparation and induction of the child. Said procedure consisted of placing electrodes for an electrocardiogram (E.K.G.), in order to observe and obtain the heart rate through a monitor. Also, a "pericordial" [sic] stethoscope was placed on the patient to constantly monitor the heart and lungs. Once the patient was ready, Dr. Santaella instructed Nurse Leguillow to begin the anesthesia procedure, using a one-percent (1%) halothane¹⁵ and ninety-nine-percent (99%) oxygen mixture.

In operating room B, the anesthetic was administered through a Compact-50 model machine, which, as determined by the trial court, was very rudimentary and, also, had a peculiarity: the oxygen and nitrous oxide valves or buttons were inverted; they were not arranged as they are arranged in other anesthesia machines in use in all other operating rooms. That is, this machine had the nitrous oxide valve where the others had the oxygen valve and vice versa. According to the evidence presented, to mix up the oxygen and halothane, the buttons or valves had to be manipulated and operated manually. The anesthetic was mixed up in a special bag attached to the machine, then it flowed through a tube and was admin-

[Footnote continued from previous page]

contract with the Hospital, pointing out that, save in exceptional cases, only he and the anesthesiologists hired by him were allowed to administer anesthetics in that Hospital. (See findings of fact number 64 of the trial court judgment.)

15 Halothane is a "[p]otent inhalation anesthetic used to induce or maintain anesthesia in any kind of surgical intervention." *Diccionario médico Teide*, *supra*, [at 293-294].

istered to the patient through a mask, which was removed, and then through an endotracheal tube.

In accordance with the evidence presented, when Nurse Leguillow began to prepare the mixture, the girl was still excited and crying. According to the testimony of anesthesiologist Dr. Santaella, she deemed that "giving her a few pumps of anesthetic would calm her down" in order to make a normal intubation. Nurse Leguillow continued operating the anesthesia machine and placed the mask on the child's face so that she would inhale the mixture. Dr. Santaella, who was observing, deemed that the girl had already reached an anesthesia plane that would allow her to begin with the intubation. She ordered the other nurse anesthetist, Ayala, to "find a vein" to inject the child with Anectine to enable intubation.¹⁶ Dr. Santaella allegedly gave an "I.V." to Nurse Ayala and the latter injected the child with the mentioned medication; from then on the child's physiological functions were completely under the control of Dr. Frederick González's anesthetist staff and at the mercy of the equipment or machinery available in the Hospital.

Five to ten seconds after the muscle relaxant was injected, the mask through which the anesthetic was being administered was removed. Next, Nurse Leguillow proceeded to intubate the girl using a laryngoscope with a Murphy number 20 tube that was connected directly to the machine. According to the oral and documentary evidence, after the intubation the child was breathing and ventilating normally. However, only six minutes after the anesthetic administration procedure had begun, Nurse Leguillow informed Dr. San-

16 This medication or drug, whose scientific name is succinylcholine chloride, is a muscle relaxant that causes total paralysis of the patient's muscular system, especially the pharynx area.

taella that the girl's heartbeats—as she received them through the pericordial [*sic*] stethoscope—were “somewhat muffled” and that the child looked pale and cyanotic. Dr. Santaella reacted by ordering Nurse Leguillow to move aside and to leave her by the head of the child in order to take charge of the situation. Faced with the possibility that the problem had to do with the depth of anesthesia, Dr. Santaella manipulated the machine to eliminate the flow of halothane; this left the girl inhaling pure oxygen; and the monitor showed a decrease in the child's heart rate.

In the opinion of the trial court, all the statements were consistent in the sense that, in view of the situation, Dr. Santaella immediately proceeded to remove the endotracheal tube and replace it with a Murphy number 18 tube. According to Dr. Santaella's testimony after she removed the tube from the child, the paleness disappeared and the monitor showed a normal heart rate. Also, as stated by Dr. Santaella, Nurse Leguillow, and Nurse Ayala, once the child recovered her color she began to bite the new endotracheal tube, which indicated that she was waking up. To prevent her from coming round from the anesthesia, Dr. Santaella, with her own hands, *administered again the halothane and oxygen anesthetic* through the new tube connected to the machine. As determined by the trial court, only 45 seconds had elapsed from the beginning of the second administration of anesthetic when the monitor began to show rapid cardiac changes, which were described as “crazy sounds at an incredible speed.” Simultaneously, cardiac sounds and pulse were no longer heard through the pericordial [*sic*] stethoscope and Dr. Santaella again disconnected the anesthetic and continued giving the girl pure oxygen.

At that moment, Dr. Ferdinand Menéndez, who had entered the operating room while Dr. Santaella was changing the endotracheal tube, began to give cardiac massage to the child. In the middle of the crisis, Dr. Antonia Jorge Frías, an

anesthesiologist with Dr. Frederick González's group, entered the operating room. Dr. Jorge testified that on the day of the operation, at around 8:10 a.m., while she was making the rounds of the Hospital's operating rooms, she looked through the glass of the door of operating room B and observed Dr. Santaella and Dr. Menéndez actively working on a patient. Dr. Santaella saw her and motioned her in. When she entered the operating room, Dr. Jorge observed that the patient was cyanotic and that Dr. Menéndez was giving her cardiac massage while Dr. Santaella ventilated her manually with one-hundred percent (100%) oxygen, but the cyanosis continued, and thus, she believed that the girl was not receiving oxygen. It was at that time that Dr. Jorge actively intervened in the child's resuscitation process and asked Dr. Menéndez to stop the cardiac massage. The monitor kept showing movements indicating an extreme fibrillation.¹⁷ After determining that indeed this was a case of cardiac arrest, and not a monitor malfunction, Dr. Jorge administered to the child the medication necessary to bring her out of the cardiac arrest, returning to a supposedly normal pulse and breathing.¹⁸

17 Fabrillation is the "rapid, and unconnected beat of numerous cardiac muscle fibers during which the heart is unable to sustain an effective synchronic contraction. The pertinent part of the heart stops pumping blood." *Diccionario médico Teide, supra*, [at 252].

18 As indicated in the judgment rendered by the Superior Court, Dr. Jorge admitted that she had signed the anesthesia sheet that forms part of the patient Alicia Maria Santos Blás's medical record—which was also signed by Dr. Santaella—but qualified her approval from the time that she entered operating room B, which was at 8:10 a.m., when the crisis had started. However, in the opinion of Dr. Jorge, there were a series of inexplicable discrepancies between the graphic showing the process of anesthesia and the ex-

While Dr. Santaella and Dr. Menéndez worked with the patient, they ordered the operating room nurses to place an *urgent call to Dr. Hidalgo, the girl's pediatrician*. The nurses tried to contact the mentioned doctor through the Hospital's intercom system and they also called him at his office. Since their efforts were fruitless, an emergency call for *any pediatrician* in the Hospital was placed. Pediatrician Edna Zayas responded to the call and when she arrived at operating room B, she noticed that Dr. Santaella, Dr. Menéndez, and Dr. Jorge were still working on the child. Dr. Jorge explained to her what had happened and mentioned the medication administered to the patient. After the child began to recover her breathing, they continued to manually ventilate her with pure oxygen. After the crisis, Dr. Santaella and Dr. Zayas ordered the child transferred to the adjacent recovery area. *There, Dr. Zayas continued looking after her waiting for her pediatrician, Dr. Hidalgo, to arrive.*

While the mentioned events took place in operating room B, on Dr. Menéndez's instructions, Ivelisse Blás Toledo had remained in the reception area in front of the operating room. When Blás Toledo realized that the operation was taking longer than the time indicated by Dr. Menéndez, she began to worry. Her fears grew when she saw nurses and

[Footnote continued from previous page]

planatory remarks on the graphic. She acknowledged a serious contradiction regarding the patient's pulse, because according to the graphic and the remarks, the girl had been given adrenaline when she had 210 heartbeats per minute. Dr. Jorge also indicated that the graphic did not show the cardiac arrest suffered by the child. Finally, she informed that she reviewed and signed the anesthesia sheet that same day in the afternoon when Dr. Santaella gave it to her already filled out and asked her to sign it.

medical staff, including Dr. Frederick González, going in, and coming out of the operating room. As stated by the trial court, she got upset and became terrified when she heard the emergency calls for a pediatrician over the loudspeaker. She asked, but no one could offer her any information about what was going on. At around 10:00 a.m., Dr. Ferdinand Menéndez approached Ivelisse and informed her that her daughter was not doing "so well." Ivelisse immediately asked him to call Dr. Hidalgo. Dr. Menéndez replied that he had already been called and that he was about to get to the Hospital soon. As determined by the trial court, Dr. Hidalgo had agreed with Ivelisse to go immediately to the Hospital if necessary or if his presence was required.

After listening to Dr. Menéndez, Ivelisse—who was alone in the hospital—burst into tears and went to a telephone to call her mother, Elba Toledo. Ivelisse tried to call her husband but she was emotionally unable to do so, thus, she remained alone waiting for her mother in the child's room. Elba Toledo arrived half an hour later and when she received the news, she also became desperate and started to cry. Elba Toledo remained in the room while Ivelisse returned to the area near the operating room to obtain more information about her daughter's condition. While she was there, her husband, Luis Nieves Piñeiro, arrived and, moments later, so did the girl's father, Luis Santos Colón,¹⁹ who had been called by the hospital nurses.

After twelve noon, a male nurse informed the child's relatives that Alicia Marie would be transferred to the Hospital's intensive care unit at 3:00 p.m. In view of the situation,

19 Ivelisse Blás Toledo and Luis Santos Colón were married from June 1977 to February 1981. During their marriage, they begot Alicia Marie Santos Blás.

While Dr. Hidalgo was in the Hospital, Ivelisse Blás asked him to examine the child in the intensive care unit. *Dr. Hidalgo replied that this was the second time that one of his patients had had an anesthesia problem in the Hospital de la Guadalupe.* Ivelisse urged him to at least contact pediatrician Dr. Edna Zayas, and Dr. Hidalgo answered *that he did not want to get more involved in the matter and left the Hospital.*²³ Dr. Hidalgo never saw Alicia Marie again and learned about her only through a personal conversation with Dr. Menéndez three or four months before he was deposed in the year 1984.²⁴

On November 18, 1981, in the morning hours, Dr. Edna Zayas approached Ivelisse Blás and her relatives and informed them that arrangements had been made *to transfer Alicia Marie to the University Pediatric Hospital.* Dr. Zayas justified the transfer indicating that the Pediatric Hospital *had the adequate facilities and the proper staff to take care of a*

[Footnote continued from previous page]

him personally in the company of Luis Nieves to beg him to go to the Hospital and see the child.

23 It bears mentioning that, during his testimony, Dr. Hidalgo admitted that he had had problems with the intensive care unit staff of the Hospital de la Guadalupe regarding a similar incident, to the point that, at that time, he deemed it necessary to transfer the patient to the University Pediatric Hospital. (TE 4/12/1987, at 226-232.)

24 At the witness stand, Dr. Hidalgo stated that Dr. Menéndez had told him the following:

"I didn't even touch her, she was pumped once and she had an arrhythmia; she was re-intubated and she was pumped for the second time, and then she fucked up." (TE 4/12/1987, at 292)

case such as Alicia Marie's case. The child was transferred in an ambulance accompanied by Dr. Zayas and a nurse. Once they reached the Pediatric Hospital, the girl was immediately admitted to the intensive care unit. She remained there for a week, and then she was transferred to a semi-private room where she remained for three additional weeks. *It was not until Alicia Marie's parents were interviewed for admission purposes at the University Pediatric Hospital, that they learned that she had serious irreversible brain damage.* Nobody in the University Pediatric Hospital could understand why the parents had not been informed, in Hospital de la Guadalupe, about the girl's serious condition.

While Alicia Marie was hospitalized in the Pediatric Hospital, her stepfather, Luis Nieves, was trained to look after, clean, feed, and, in general, care for the child.²⁵ Alicia Marie was fed through a nasogastric tube that was introduced through the nose down to the stomach and the adequate placement of which had to be checked by using a stethoscope. The tube had to be changed three or four times a day. Once the tube was in place and it was checked that it was correctly placed, food was administered in liquid form through the same. Luis Nieves was also trained to suction saliva from the child—which had to be done constantly—to give her physical therapy three times a day and inhalation therapy. After Ivelisse gave birth, her husband trained her in

25 Luis Nieves was selected from among the other child's relatives because he had worked in a hospital and he had some basic knowledge of this type of care. Ivelisse was not trained initially because she was in an advanced stage of pregnancy and she had miscarriage symptoms.

these procedures and they began to give the child the daily care together.²⁶

When the girl was discharged from the Pediatric Hospital, Ivelisse Blás Toledo *had to resign from her job to take care of her daughter on a full-time basis*. Consequently, she could not continue paying her house rent because her husband's income was used to pay for the family's immediate expenses, including the cost of Alicia Marie's care. In view of this situation, her husband's parents offered them the master bedroom in their home, which they used for some months. Then, aware of the fact that Alicia Marie needed special facilities and a room for herself—air conditioned twenty-four hours a day—Luis's parents built a second floor so that Ivelisse and Luis could be on their own and the girl could have adequate facilities, according to the medical instructions.

Since Alicia Marie's condition did not improve, in October 1982, she was examined by Dr. Eduardo Mirabal Font, a pediatrician and neurologist. The physical and neurological examination revealed *that the girl suffered from anoxic encephalopathy,²⁷ 28 quadriplegia,²⁹ and dementia.³⁰* At the

26 Ivelisse told the trial court how she was emotionally affected every time she had to intubate her daughter because the tube hurt the ducts and the child suffered very much.

27 At the trial court hearing, Dr. Mirabal Font himself explained that the term "encephalopathy" is a neurological term indicating brain damage. (TE 15-16/12/1987, at 233.)

28 As indicated by Dr. Mirabal Font, the term "anoxic" was explained as one of etiology based on the history of the case. *Id.*

Anoxia is a "situation in which organic tissues receive a reduced amount of oxygen." *Diccionario médico Teide, supra*, [at 35].

hearing in the trial court, Dr. Mirabal Font testified that a healthy and normal patient that is taken to the operating room and comes out in the conditions that Alicia Marie did, *must have suffered an "anoxic insult" related to a deficient breathing and circulation oxygenation associated with a cardiac arrest.* (TE 15-16/12/1987, at 234.) After he evaluated her, Dr. Mirabal Font determined that Alicia Marie's condition would allow her to use the brainstem circuits necessary to breath spontaneously, to keep the blood pressure and temperature, and to keep her kidneys, liver, and intestines working. *However*, he clarified that there was no evidence that the child was in contact with her environment in the sense of seeing and hearing. The girl could not turn her body, hold her head up, or understand what she was told, and she could not move by herself either. (TE 15-16/12/1987, at 235-236.) Despite these conditions, Alicia felt painful stimuli in a non-specific manner. Dr. Mirabal explained this through an example: if she was pricked with a pin, the girl cried but did not pull back the hand or the limb that was pricked because she

[Footnote continued from previous page]

29 Though the judgment of the Superior Court indicates that Dr. Mirabal Font's diagnosis was quadriplegia, this seems to be an error because then the definition given for this term corresponds to the definition of hemiplegia. This, as explained by Dr. Mirabal Font himself, refers to the brain's lack of motor control over the legs. (TE 15-16/12/1987, at 234.)

30 Finally, he explained that the term dementia refers to a deficiency of the superior brain functions that prevents a human being from judging; communicating, and being in contact with his or her environment. The condition is related to the destruction of the greater part of the circuits of the brain hemisphere. (TE 15-16/12/1987, at 232-233.)

could not perceive what was hurting her or where in her body. (TE 15-16/12/1987, at 238.)

In view of the neurological findings, Dr. Mirabal Font recommended Alicia Marie's parents to keep her under continued and constant watch, more than what was required for a normal child since, being in such a fragile condition, any illness, however simple, could have serious consequences. In addition, he told them that in this type of case of brain damage, there is *no* medication, treatment, or procedure that would improve the condition. (TE 15-16/12/1987, at 240-242.)

In view of the information given by Dr. Mirabal Font, Alicia's parents took her to John Hopkins Hospital in Baltimore, Maryland, looking for a "second opinion." They were there for a month, during which time Alicia underwent neurologic and diagnostic tests that confirmed Dr. Mirabal Font's entire diagnosis and prognosis. For that trip, the girl's parents had to raise—from their savings and some contributions they received from relatives and friends—\$8,700, which were used entirely for that purpose.

Dr. Mirabal Font examined the girl again on her fourth birthday, and then when she was five. He examined her again two days before he appeared in court as witness for plaintiff. In the trial, he testified that his most recent diagnosis was essentially the same he had made when he examined the minor in 1982. *In his opinion the girl did not have a future and had no possibilities of neurological improvement.* (TE 15-16/12/1987, at 253.) He stated that the life expectancy of children with severe encephalopathy, such as Alicia Marie's, is *25 years on the average*. He deemed that Alicia Marie falls within that average life expectancy due to the high standard of care she is receiving from her parents and

relatives. (TE 15-16/12/1987, at 255-257.) At the time of the hearing, this average life expectancy had decreased—due to the lapse of time—to 19 years.³¹

II

On October 13, 1982, a civil action for damages was filed in the Superior Court of Puerto Rico; plaintiffs in that action were: Ivelisse Blás Toledo de Nieves, Luis Edgardo Nieves Piñeiro, and their Conjugal Partnership, on their behalf and on behalf of the minor Alicia Marie Santos Blás; Luis A. Santos, on his own behalf and on behalf of his minor daughter Alicia Marie Santos Blás; Efraín Santos Rivera; Elba Toledo; and Carmen Iris Piñeiro. They alleged that they had sustained damages as a result of the *medical malpractice* of Hospital Nuestra Señora de la Guadalupe, Inc., Dr. Frederick González, Dr. Miguel A. Vega, Dr. José Hidalgo, Dr. Ferdinand Menéndez, Dr. Santaella, Dr. Roberto Bengoa, Dr. Antonia Jorge, Gloria Ayala de Ferrer, Maria Leguillow, their respective spouses and all the conjugal partnerships constituted by them. The Grupo de Anestesiología (anesthesiology group) "XYZ," Respiratory Care of Puerto Rico, Inc.,

31 When the incident in operating room B of Hospital de la Guadalupe occurred in November 1981, the girl was two years and nine months old. When judgment was rendered in the Superior Court, the girl was nine years, and according to the expert testimony, she could certainly survive 19 more years, that is, approximately until the age of 28. In its judgment, the Superior Court emphasized that given the quality of care that the child is receiving from her relatives she could easily reach and even surpass her life expectancy. Dr. Mirabal Font reached the same conclusion. (TE 15-16/12/1987, at 257.)

and Ayerst Laboratories (PR), Inc., were also included as defendants.³²

After a long litigation in which several cross-claims against co-party were filed, the trial court rendered judgment on November 28, 1988,³³ holding the following defendants liable: Hospital Nuestra Señora de la Guadalupe, Dr. Frederick González, Respiratory Care of Puerto Rico, Inc., Dr. Gloria Santaella, Maria Leguillow, Gloria Ayala de Ferrer—the last three as employees of Dr. Frederick González and Anesthesia Service III—Dr. José R. Hidalgo, and Dr. Ferdinand Menéndez.³⁴ The trial court ordered defendants to solidarily

32 Plaintiffs subsequently amended the complaint to include as defendants Dr. Edna Zayas, her husband, and their conjugal partnership, and the Insurance Company of North America, Dr. Hidalgo's insurer. Both Dr. Hidalgo and his insurer denied the alleged negligence and filed cross-claims against the Hospital, Antesthesia Service III, Respiratory Care of P.R., Dr. Ferdinand Menéndez, Dr. Gloria Santaella, Dr. Frederick González, and Dr. Edna Zayas.

33 Said judgment was filed in the record and notified to the parties on December 1, 1988.

34 The Superior Court dismissed the complaint against Dr. Miguel Vega Rolón and his insurer since no evidence of negligence had been presented against him. The trial court also dismissed the complaint against Dr. Antonia Jorge Frías because the evidence presented did not give any indication of possible liability or negligence on her part.

On the other hand, and in keeping with the stipulation between the parties, the trial court dismissed the action against Dr. Edna Zayas, her husband, and their conjugal partnership because their settlement agreement was approved by all the parties. Regarding Dr.

[Footnote continued on next page]

pay \$2,224,743.27.³⁵ The Hospital, Dr. Hidalgo, Dr. Menéndez, Dr. González, Dr. Santaella, their respective insurance companies, and the Patient's Compensation Fund Administration came to this Court seeking review.³⁶ *We decided to*

[Footnote continued from previous page]

Ferdinand Menéndez and the conjugal partnership constituted by him and his wife, a settlement agreement was accepted and, as clarified by the trial judge, the right to contribution remains pending resolution.

Finally, after plaintiff told the trial court its interest in voluntarily dismissing the action against Ayerst Laboratories, Inc., the trial court rendered partial final judgment dismissing the same.

35 The trial court dismissed the claim of minor Luis Nieves Blás, the victim's brother, because he had not been born at the time of the accident. For purposes of the right to contribution between those who were solidarily liable, the trial court distributed the amount awarded to plaintiffs as follows: (1) thirty-five percent (35%) of negligence to codefendant Hospital Nuestra Señora de la Guadalupe; (2) thirty-five percent (35%) jointly, to codefendants Dr. Frederick González, Respiratory Care of Puerto Rico, Inc., Dr. Gloria Santaella, Maria Leguillow, and Gloria Ayala de Ferrer (the last three as employees of Frederick González and Anesthesia Service III); (3) twenty percent (20%) to codefendant Dr. José Rafael Hidalgo, and (4) ten percent (10%) to codefendant Dr. Ferdinand Menéndez.

All the mentioned defendants were ordered to solidarily pay plaintiffs all the costs and expenses and to pay interest at twelve percent (12%) from the date of the filing of the complaint. Codefendants were also ordered to pay \$60,000 for attorney's fees.

36 Five different actions have been filed in this Court regarding the facts that give rise to the mentioned judgment. All of them

[Footnote continued on next page]

review. We ordered the lengthy transcription of the trial court proceedings. Being in a position to resolve this matter, we proceed to decide.³⁷

In view of the great number of errors assigned by appellants—many of which deal with the same matter—we will discuss together those which, by their nature, may be grouped. We will only discuss separately those errors that have been assigned by a single appellant.

III. Discussion of the errors assigned by Dr. Hidalgo

Regarding the pediatrician, plaintiff alleged and the Superior Court ruled that Dr. Hidalgo incurred negligence in (1) recommending an operation that was not indicated; (2) suggesting inadequate hospital facilities; (3) preparing a medical clearance with an altered date, and (4) abandoning his patient

[Footnote continued from previous page]

seek review of the November 28, 1988 judgment rendered by the Superior Court; they have all been consolidated and are decided here.

37 On June 10, 1992—through an Informative Motion—we were informed that Alicia Marie had died on May 18, 1992.

after the incident in the operating room.³⁸ Dr. Hidalgo alleges that the trial court committed eight errors.³⁹

38 The Superior Court held Dr. Hidalgo liable because: (1) he negligently “triggered a sequence of events that brought his young patient... to the operating room of the... Hospital where she suffered irreparable damages;” (2) because that “sequence of events began with the issuance of a medical clearance for the tonsillectomy and adenoidectomy, knowing that the pediatric criteria for said intervention were not present and that the operation was not justified.” (See the trial court judgment, at [102].)

39 Dr. Hidalgo and his insurer Insurance Company of North America appeared together seeking review of the judgment rendered against them on November 28, 1988, by the Superior Court (Hon. Luzgarda Vázquez de Santiago, Judge) alleging that the court *a quo* erred:

(1) “in granting the complaint and fixing a 20% liability on Dr. Hidalgo.

(2) “in holding Dr. José R. Hidalgo liable for his failure to intervene with the specialist and the girl’s parents to prevent the operation.

(3) “in holding Dr. José R. Hidalgo liable for supposedly “abandoning” the patient Alicia Marie Santos Blás—after the incident in the operating room—since: (i) abandonment did *not* take place; (ii) all the elements of an abandonment action are not present here; and (iii) Dr. Hidalgo’s actions after the incidence (sic) in the operating room did *not* cause any damage since the already (sic) damage had been caused.

(4) “in holding Dr. Hidalgo liable for “not defending or acting as advocate of the rights of the minor Alicia Marie” and thus preventing the operation since there is a difference of opinions among medical authorities on whether the operation that the

As *first error*, Dr. Hidalgo points out that the court should have not imposed on him a 20% liability for referring his patient to Dr. Menéndez. Dr. Hidalgo alleges that his participation *was limited* to referring the child for evaluation and that he did not recommend the operation, or intervene in the decision to operate, or suggest where to perform the op-

[Footnote continued from previous page]

child would undergo was the correct treatment or procedure in the case's circumstances. (*Jerez Torres v. Bladuell Ramos*, 88 JTS 4)

(5) "in fixing a 20% liability on Dr. Hidalgo—who did not take part in the decision to operate, or where to operate, and who was not even in the operating room when the anesthetic was administered to the child—while the court fixes on Dr. Menéndez—who was the one who decided to operate, chose the hospital, and was in the operating room when the anesthetic was administered to the girl—only a 10% liability. This determination does not represent the most rational and fair balance of the evidence presented.

(6) "in imposing on Dr. José R. Hidalgo the payment of attorney's fees and interest at the annual rate of 12% from the filing of the complaint, and payment of costs for obstinacy.

(7) "in the damage amounts awarded to plaintiffs for the mental suffering in light of the law in force in Puerto Rico.

(8) "in denying the appearing party's motion to dismiss before the hearing on the merits, and in ending [the presentation of] plaintiff's evidence and which was later requested by motion and violating the most elemental Rules of Civil Procedure.

eration.⁴⁰ He also alleges that he could not anticipate what would happen to the child once she was anesthetized or that the anesthesiologists would incur in such a gross negligent act as applying anesthetic a second time without first determining what had caused the first adverse reaction.⁴¹ Furthermore, he alleges that he told the child's mother that, to the best of his knowledge, the operation was *not* indicated in accordance with the criteria outlined in pediatric textbooks.

Regarding the medical clearance, Dr. Hidalgo alleges that as shown by the evidence presented in the trial court, before he filled out said document or preoperative consultation, he informed Alicia Marie's mother his opinion about the operation, but that this notwithstanding, she decided to go ahead with the operation. He points out too that said document did not constitute an approval of the justification for the surgery. He adds that the medical clearance is just a document used by the primary physician to point out to the sur-

40 He adds that not only did he not intervene in the decision to operate, but that he could not do so because, had he intervened, he would have given an opinion in an area of medicine outside his field of specialty. This allegation is evidently erroneous because, first, the pediatrician is a specialist in children's illnesses, and, second, Dr. Hidalgo himself admitted that there are *peditric* criteria for determining when the tonsils and adenoids should be removed and Alicia Marie did not meet these criteria.

41 Dr. Hidalgo alleges that the only cause of the damages sustained by Alicia Marie (the one that most probably caused such damages) was the combined negligence of the Hospital—by keeping old and inadequate anesthetic equipment—and of the anesthesiologists by administering the anesthetic a second time without establishing the causes why the girl had such an adverse reaction the first time it was administered.

geon preexisting conditions that could somehow interfere with the surgery that the patient will undergo. Therefore, by filling out and signing said document he did *not* approve or ratify the need or justification for the *operation*; this responsibility, as he alleges, solely belongs to the surgeon.

As *second error*, Dr. Hidalgo points out that the trial court erred in holding him liable for not intervening with the specialists and the girl's parents to prevent the operation. On this point, he alleges that the evidence showed that he advised the child's mother to wait and to try a conservative treatment.

On the other hand, he indicates that even if the surgical procedure may not have been indicated, the operation was *indeed* indicated according to the otorhinolaryngology textbook of 3 Paparella & Shumrick, *Paparella Otorhinolaryngology* [1973]. Citing *Pérez Torres v. Bladuell Ramos*, 120 D.P.R. 295 [20 P.R. Offic. Trans. 316] (1988), Dr. Hidalgo points out that this fact exempts him from liability because it allows him to invoke *the defense of difference of opinion* among medical authorities. In his *fourth error*, Dr. Hidalgo contends that the trial court should have not hold him liable for "not defending or acting as advocate of the rights of the minor." He alleges in his defense that the trial court's conclusion that operating the child was absolutely unnecessary and that the pediatrician should have known this, is erroneous.

Because they are closely related, we will discuss the first, second, and fourth errors assigned by Dr. Hidalgo. We begin with the second error.

Though it is true that pursuant to our pronouncements in *Pérez Torres v. Bladuell Ramos*, 120 D.P.R. 295 [20 P.R. Offic. Trans. 316], the existence of a difference of opinion among medical authorities exempts the physician who follows one of the different alternative actions accepted in the profession, this defense has only been applied to differences

among medical authorities in the same discipline or specialty. This is *not* the case here. *In this case there exist uniform pediatric criteria accepted by all expert pediatricians—including Dr. Hidalgo himself—as the correct criteria in the field of pediatrics.*

Indeed, as the child's pediatrician, Dr. Hidalgo could and should have prevented Dr. Menéndez from submitting Alicia Marie to a surgical intervention. Dr. Hidalgo knew or should have known that the child did *not* meet the pediatric criteria to endure the operation, thus, by being exposed to the surgical procedure, she was being exposed to an unnecessary risk. Even though Dr. Hidalgo knew this, he did nothing to prevent the child from being unnecessarily exposed to the risk of surgery. This conduct is at odds with the practice recognized by modern pediatrics, that is, *the pediatrician is the one who defends his patient and becomes his advocate.*

In this regard, Dr. Juan Cárdenas, an expert pediatrician presented by plaintiff, explained to the trial court that when a pediatrician believes that a patient does not meet the pediatric medical criteria to endure a tonsillectomy and an adenoidec-tomy, *he has a duty to contact the otorhinolaryngologist to whom he has referred his patient.* He also indicated that when doctors cannot harmonize their opinions, *the best practice of medicine compels the pediatrician to advise the parents of the child that the operation is contraindicated, and he opined that in such case, the pediatrician has a duty to try to convince them not to go along with it.* (Regarding this, see the TE 8/12/1987, at 3 et seq.)

On the other hand, Dr. Frank Rodríguez Martínez, a pediatric pneumologist, acting as expert witness for defendant Dr. Hidalgo, *accepted that the concept of "child advocate" is*

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On the other hand, Dr. Frank Rodríguez Martínez, a pediatric pneumologist, acting as expert witness for defendant Dr. Hidalgo, *accepted that the concept of "child advocate" is*

*solidly recognized by the American Academy of Pediatrics.*⁴² (TE 22, 28 and 29/12/1987, at 569.) In addition, he indicated that when a pediatrician refers a child to another physician for evaluation, *the pediatrician must keep a direct communication with the latter because this is the ideal source of information on the requested consultation.* Finally, he informed the court that it is not a good medical practice to give a medical clearance with the wrong date and to sign a consultation sheet in the form and manner that Dr. Hidalgo did. (TE 22, 28 and 28/12/1987, at 578.)

Undoubtedly, under the circumstances of the case, by not objecting to the operation, or, at least, explaining to the child's mother that the operation was not recommended, and by not informing the surgeon that the pediatric criteria contraindicated the operation, Dr. Hidalgo, as Alicia Marie's pediatrician, *strayed from the medical attention standard required in the practice of pediatrics*, and, therefore, he incurred negligence. *Medina Santiago v. Vélez*, 120 D.P.R. 380 [20 P.R. Offic. Trans. 399] (1988); *Oliveros v. Abréu*, 101 D.P.R. 209 [1 P.R. Offic. Trans. 293] (1973).⁴³ It is true, though, that even if he had performed his duty to inform the surgeon and the girl's parents that the operation was contraindicated, they could have disregarded his opinion and proceeded with the operation. Maybe not. We do not know.

42 As he explained, the implementation of this concept requires the pediatrician to become the "child's advocate," not only with regard to other physicians, but also with regard to the child's parents. This has the purpose of protecting the child from an unnecessary or contraindicated operation or procedure.

43 It is also worth mentioning that sec. 1802 of the Civil Code penalizes negligence both by act or by omission. See sec. 1802 (31 L.P.R.A. § 5141).

*What we do know is that Dr. Hidalgo clearly breached his duty and obligation to inform this; thus, allowing a contraindicated operation to take place.*⁴⁴ It is a reiterated rule that

44 As admitted by all the expert pediatricians and by Dr. Hidalgo himself, the pediatric standards for removing the tonsils and the adenoids are the following, as established in the [Vaughan, McKay, and Behrman,] *Nelson Textbook of Pediatrics* [1178, 1179 (11th ed. 1979)]:

"Indications for Tonsillectomy. Parents often attribute frequent respiratory infections, allergic bronchitis, mouth-breathing, recurrent purulent or serous otitis, poor appetite, failure to gain weight, or recurrent or chronic fever to chronic tonsillitis. However, there is no evidence that tonsillectomy and adenoidectomy decrease the incidence of these problems during childhood. Until better means are available to identify these children who may truly benefit from tonsillectomy and adenoidectomy, it seems prudent to avoid it in most cases. Physician awareness that hospital charts were being monitored routinely by others to identify the stated indications for tonsillectomy and adenoidectomy have resulted in marked decrease in the frequency of these operations.

"Decision for removal of tonsils should be based on symptoms and signs directly related to the tonsils and to disturbances in closely related structures. Local indications for removal are recurrent symptomatic hypertrophy associated with signs and symptoms of obstruction, and chronic infection. Tonsillectomy should be considered only in those children who have 4 or more culture-proved episodes of group A streptococcal pharyngitis associated with tonsillitis in a year and in whom immunologic development is adequate, it should rarely be considered in a child under 2 years of age." [Vaughan, McKay, and

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in Puerto Rico, in view of the duty of foreseeability, a person is liable for the probable consequences of his acts. *Pacheco v. A.F.F.*, 112 D.P.R. 296 [12 P.R. Offic. Trans. 367] (1982); *Rivera v. People*, 76 P.R.R. 378 (1954).

In such circumstances, we are of the opinion that Dr. Hidalgo's *omission* or failure to intervene on behalf of his patient's best interests was one of the factors that *most probably* caused the damage and *unnecessarily* placed Alicia Marie in the operating room. See *Rodríguez Crespo v. Hernández*, 121 D.P.R. 639 [21 P.R. Offic. Trans. 637] (1988); *Ríos Ruiz v. Mark*, 119 D.P.R. 816 [19 P.R. Offic. Trans. 862] (1987).

The fact that Dr. Hidalgo—who was called on several occasions to examine Alicia Marie after the incident that took place during the administration of the anesthetic—did not go to see the patient until the following day, adds to his liability for medical malpractice. In our opinion, *his attitude of lack of interest and neglect* in such an emergency situation is at odds with the best practice of medicine. *Nuñez v. Cintrón*, 115 D.P.R. 598, 615-616 [15 P.R. Offic. Trans. 786, 808]

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Behrman,] *Nelson [Textbook of Pediatrics]*, *supra*, at 1178. (Emphasis added.)

"When on rare occasions, it seems advisable to recommend tonsillectomy for a child of 2 to 3 years of age every attempt should be made to postpone the operation. Frequently when the operation is postponed for reasons of age, the apparent need for it disappears within the next year or so." [Vaughan, McKay, and Behrman,] *Nelson [Textbook of Pediatrics]*, *supra*, at 1179. (Emphasis added.)

(1984). In view of the abovesaid, the mentioned errors were *not* committed.⁴⁵

In his *eighth* error, Dr. Hidalgo contends that the trial court erred in ignoring our civil procedural law and in denying his motion to dismiss. First, he alleges that given the high number of plaintiffs and defendants involved in this action, the trial court should have taken special measures to control the orderly handling of all the stages of the case. Citing *Vellón v. Squibb Mfg., Inc.*, 117 D.P.R. 838 [17 P.R. Offic. Trans. 1005] (1986), he alleges that the trial court erred in not holding a pretrial conference under Rule 37.1 of the Rules of Civil Procedure. Second, he indicates that he was not served with notice of the judicial authorization hearing in which plaintiffs asked the court's leave to settle with codefendant Dr. Menéndez.

With regard to the first point, we must mention that in *Vellón v. Squibb Mfg., Inc.*, 117 D.P.R. 838 [17 P.R. Offic. Trans. 1005], we indeed stated that, in *complex* cases, the judge must, in keeping with the particular needs and circumstances of each case, take the appropriate measures to assume control over the proceedings. The decision in that case, however, does not compel, [the court or counsel] to hold meetings or conferences in all cases. Besides, the text of Civil Procedure Rule 37.1 expressly provides that the court *may*

45 As third error, Dr. Hidalgo contends that the trial court should have not held him liable for abandoning his patient after the incident in the operating room. He alleges that there was no such abandonment and that neither was there a causal relation between the alleged abandonment and the damages suffered by the minor. In view of the above decision regarding the first, second, and fourth errors assigned by Dr. Hidalgo, we need not discuss this third error.

hold a pretrial conference *if it deems it necessary*, because its faculty to summon [counsel] to such conference is discretionary. See 32 L.P.R.A. App. III, R. 37.1.

With regard to the second point, it is worth noting that authorizations involving the rights and assets of minors are governed by the provisions of the Code of Civil Procedure, 32 L.P.R.A. § 2721 *et seq.* This section provides that, at the request of the minor's parents or guardian, the court will hold an authorization hearing. Said petition is made *ex parte* and the parents, or guardian, appear as the interested party that seeks the authorization, and the prosecution represented by the Honorable Minor's Advocate has the duty to defend the minor's interests. *Therefore*, the service of notice or the appearance of those who were not interested parties in the mentioned judicial authorization hearing, was not necessary. See 32 L.P.R.A. App. III, R.67.1. Furthermore, as part of the settlement agreement, the remaining defendants retained their right to contribution with respect to those who settled with plaintiffs, thus, the error assigned was not committed.⁴⁶

IV. Discussion of the errors assigned by Dr. Santaella

The Superior Court ruled that Dr. Frederick González was liable for the negligent acts of his employees, one of whom was Dr. Santaella.⁴⁷ The Superior Court further

46 Finally, appellants Dr. Hidalgo and his insurer allege that the trial court allowed the filing of an *ex parte* memorandum which was never served on them. This error was not committed. The mentioned memorandum was never filed and is not part of the record on review, or of the original record of the case.

47 That is, of the employees of the Anesthesia Service III, an entity entirely owned by Dr. González. See the discussion at ___ *et seq.* of this Opinion.

deemed that codefendants Dr. Gloria Santaella and Dr. Frederick González, and the Hospital, incurred negligent acts by failing to order the immediate transfer of the girl to a hospital with the necessary equipment and staff to take care of the condition in which she had been placed.

Dr. Gloria Santaella, her insurer, Universal Insurance Company, and the Patient's Compensation Fund Administration (hereinafter, AFCP, by its Spanish acronym) came to this Court assigning several errors that, in their opinion, justify the reversal or modification of the appealed judgment.⁴⁸

48 As they indicate before this Court, the judgment from which appeal is taken must be reversed or modified on the following grounds:

"FIRST: Plaintiffs' own evidence tended to establish that the condition in which the minor Alicia Marie finds herself was due to an idiosyncratic reaction to the agent used in the anesthesia administration procedure, a condition that appellants could not foresee and, therefore, they cannot be held liable.

"SECOND: Dr. Gloria Santaella, as anesthesiologist, is not legally liable for the condition in which the minor Alicia Marie finds herself, thus, the judgment that holds her liable should not prevail.

"THIRD: The judgment is erred inasmuch as it awards compensation for Alicia Marie's alleged loss of her future earning capacity.

"FOURTH: The judgment is erred inasmuch as it awards damages for Alicia Marie's alleged suffering and mental anguish.

"FIFTH: Dr. Santaella's husband and the Conjugal Partnership were not summoned, and neither did they submit to the jurisdiction of the Court, thus, it is an error to hold them liable.

"SIXTH: Alicia Marie's grandparents, to wit, Elba Toledo and Efraín Santos, passed away before the trial was held, thus, they could not testify regarding their mental anguish. Therefore, it

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They indicate in their *first* assignment that the evidence brought before the trial court tended to establish that the cause of the damage suffered by Alicia Marie was an idiosyncratic reaction to the anesthetic agent, which respondents could have not foreseen. In their *second* assignment, they allege that the trial court erred in holding them liable for Alicia Marie's condition. Since they are closely related, we will address both assignments together.

The evidence presented in the trial court was consistent in the sense that *after the child's first reaction to the anesthetic*, Dr. Santaella proceeded *immediately* to anesthetize her again *without having determined the reasons why the girl adversely reacted the first time the anesthetic was adminis-*

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is an error to award compensation for their possible anguish to their heirs.

"SEVENTH: The compensations awarded to plaintiffs are excessive and are not proportional to the alleged damages.

"EIGHTH: Imposing on appellant Dr. Santaella and her insurer the payment of prejudgment interest and attorney's fees is not proper at law.

"NINTH: The liability of the Patient's Compensation Fund Administration is limited by its policy, to the sum of SEVENTY FIVE THOUSAND DOLLARS (\$75,000), free from interest and attorney's fees.

"TENTH: The Court may not hold Respiratory Care of P.R., insured by Universal Insurance Company, liable because the service rendered by the latter was through competent graduate nurses and because it was not established by the evidence—by plaintiffs who had to establish it—that Alicia Marie had arrived to the care of said entity without the damage that finally affects her capacity."

tered; thus, inducing the “anoxic insult” suffered by the child. Dr. Santaella could and should have foreseen the second complication episode and, therefore, she is liable for the damages caused by her lack of foreseeability. *She was the medical doctor in charge of the child at the time of the incident.* Dr. Santaella herself told the trial court that during the anesthesia administration procedure the child was under her control. (TE 15-16/12/1987, at 101.) It was Dr. Santaella who made the decision to anesthetize the patient again.⁴⁹ Dr. Santaella was negligent also because she knew that the anesthesia and pediatric emergencies equipment at the Hospital de la Guadalupe—operating room B—was obsolete and dangerous for the patient and, despite that fact, she used the same. *She thus admitted it.*⁵⁰ In view of this situation, we hold that the two errors assigned were not committed.

49 That is why the fact that Dr. Santaella was an employee of the anesthetist group does not exempt her from liability either.

50 Dr. Santaella testified that the equipment in operating room B was inadequate since the Compact 50 machine did not have an oxygen analyzer (TE 15-16/12/1987, at 34-35) and that, therefore, there was no guarantee that the desired percentage of oxygen was being administered to the patient. (TE 15-16/12/1987, at 37.)

Moreover, Dr. Santaella affirmed that since 1979 she had reported on several occasions the need to have the necessary and adequate equipment available in the operating rooms to take care of emergency situations that could arise as a consequence of the administration of anesthetic. During the evidentiary hearing in the trial court, Dr. Santaella stated the following when questioned by plaintiffs’ attorney:

“Q. Specifically, in this case, on November 16, 1981, you consider that what happened is due to the lack of that machine that you said it would have been ideal to have there.

In her *fifth* assignment of error, Dr. Santaella alleges that her husband and the conjugal partnership constituted by them were not summoned, thus, they must not be liable to plaintiffs. It must be pointed out that the Superior Court judgment did not impose any liability on Dr. Santaella's husband, thus, we do not address the assignment insofar as it refers to the husband. Concerning the assignment about the conjugal partnership, plaintiffs-appellees allege that, though the best practice in our jurisdiction is that each spouse be summoned separately, one of them may be summoned on behalf of the conjugal partnership. Based on *Pauneto v. Nuñez*, 115 D.P.R. 591 [15 P.R. Offic. Trans. 777 (1984)]; *Int'l Charter Mortgage Corp. v. Registrador*, 110 D.P.R. 862 [10 P.R. Offic. Trans. 1126] (1981); *García v. Montero Saldaña*, 107 D.P.R. 319 [7 P.R. Offic. Trans. 353] (1978); and *Cruz Viera v. Registrador*, 118 D.P.R. 911 [18 P.R. Offic. Trans. 1046] (1987), [plaintiff-appellees] contend that summoning only one of the codefendants, as *co-administrator of the conjugal partnership*, is sufficient to allow the court to acquire jurisdiction over the conjugal partnership. We agree.

In *Pauneto v. Nuñez*, 115 D.P.R. at 594 [15 P.R. Offic. Trans. at 781], we held on this matter that:

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"A. Counsel, I am absolutely sure that if I had had a blood pressure instrument that would have allowed me to measure exactly or, at least, that could have given me an idea of what was going on with this girl's blood pressure from the first time, I would have been able to do something else and I would have been able to take other measures. Without a doubt, this girl's blood pressure must have sunk the first time.

See TE 15-16/12/1987, at 187-190.

With regard to the marital community, we have recognized that jurisdiction may be acquired over the same by summoning only one of the co-administrators of said community. *Int'l Charter Mortgage Corp. v. Registrador*, 110 D.P.R. 862, 864 (1981); *García v. Montero Saldaña*, 107 D.P.R. 319, 341 (1978). However, the best practice is to include both spouses as a cautionary measure in the event there exists a conflict of interest. *Alicea Alvarez v. Valle Bello, Inc.*, 111 D.P.R. 847, 854 (1982).

In Puerto Rico, since the reform of the sections of the Civil Code that deal with the conjugal partnership, both spouses are co-administrators of the conjugal partnership and, therefore, ordinarily, they are both qualified to represent it. *Pauneto v. Nuñez*, 115 D.P.R. 591 [15 P.R. Offic. Trans. 777]. In light of the abovesaid, there was no need to summon the husband of codefendant Dr. Santaella.

V. Discussion of the errors assigned by Dr. Frederick González

The Superior Court held both Dr. González and Hospital de la Guadalupe liable for not having duly trained personnel and for using inadequate equipment on the patient.⁵¹ In addition, the Superior Court held Dr. González liable for the negligent acts of his employees, to wit, Dr. Santaella and nurse anesthetists Maria Leguillow and Gloria Ayala de Fer-

51 See the November 28, 1988 Superior Court Judgment at 108-109.

rer. Dr. González takes appeal from said judgment assigning several errors to the trial court.⁵²

52 Altogether, he assigns fourteen errors to the trial court, to wit:

"First error: ...in assigning liability for acts of medical malpractice to codefendants Gloria Ayala and Maria Leguillow, who were only present in the operating room of the Hospital Nuestra Señora de la Guadalupe as nurse anesthetists when they were at all times under the control, direction, and supervision of the anesthesiologist in charge of the case, Dr. Gloria Santaella and, thus, there is no causal relation between their acts and the incident involving the minor Alicia Marie Santos Blás.

"Second error: ...in assessing the liability of codefendant-appellant Respiratory Care of Puerto Rico Inc., who did not intervene as corporate entity in any incident related to the outcome of the anesthesia administration procedure to the minor Alicia Marie Santos Blás, and whose services were limited to the post-surgery respiratory care, immunizing it against any causal relation with the critical outcome of said intervention.

"Third error ...in finding that codefendant-appellant Dr. Gloria Santaella was an employee of codefendant-appellant Dr. Frederick J. González when she intervened as anesthesiologist in charge of the case in the surgical intervention of the minor Alicia Marie Santos Blás.

"Fourth error: ...in assessing the liability of Dr. Frederick J. González by arbitrarily using elements such as that the equipment used in the facilities of Hospital Nuestra Señora de la Guadalupe at the time of the intervention on November 16, 1981, was inadequate; that it was jointly owned by Dr. Frederick J. González and Hospital Nuestra Señora de la Guadalupe; that its alleged lack of maintenance and its obsolescence bore a causal relation with the incident that involved the minor Alicia

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Marie Santos Blas; and that there were irregularities in the preparation of the medical records.

"Fifth error: ...in awarding compensation for damages to plaintiffs-appellees Efraín Santos Rivera and Elba Toledo who had passed away at the time the trial was held and did not present direct evidence of their alleged damages.

"Sixth error: ...in awarding compensation in the amount of \$500,000.00 to the minor Alicia Marie Santos Blás for the physical and mental damages caused to her and which she continues and will continue to suffer, despite the fact that the undisputed expert evidence established that at the time of the incident she suffered serious irreversible brain damage that placed her in a state similar to that of a newborn but at a lower level because she does not have a "baby's capacity of central fixation."

"Seventh error: ...in awarding a compensation in the amount of \$391,043.27 to the minor Alicia Marie Santos Blás for the cost of the daily care required during her estimated life expectancy, even though the expert evidence established a life expectancy of 15 years which after a 12% deduction reported a cost of \$186,732.00 and/or \$238,379.97 after a 6% deduction.

"Eighth error: ...in awarding the minor Alicia Marie Santos Blás a compensation in the amount of \$30,000.00 for the impairment of her earning potential despite the fact that the undisputed evidence established that the minor has a "brain dead" condition which likens it to the decision of this Honorable Supreme Court in the case of *Pate v. U.S.A.*, 88 JTS 22, opinion of March 4, 1988.

"Ninth error: ...in awarding a compensation to coplaintiff Ivelisse Blds Toledo in the amount of \$800,000.00 for her past and future suffering and mental anguish, caused by the physi-

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cal and mental condition of her baby daughter, which amount is highly unreasonable and punitive in nature.

"Tenth error ...in awarding a compensation of \$300,000.00 to plaintiff Luis Santos Colón, the biological father of the minor Alicia Marie Santos Blás, for his past and future suffering and mental anguish, which amount is highly unreasonable and punitive in nature.

"Eleventh error: ...in awarding a \$50,000.00 compensation to Luis Edgardo Nieves Piñeiro, the stepfather of the minor Alicia Marie Santos Blás, for all his suffering and mental anguish, which amount is highly unreasonable and punitive in nature.

"Twelfth error: ...in awarding a \$15,750.00 compensation to coplaintiff Ivelisse Blás Toledo for the loss of earnings sustained; a \$29,250.00 compensation to the Conjugal Partnership made up of Luis Edgardo Nieves Piñeiro and Ivelisse Blás Toledo for their income reduction; an \$8,700.00 compensation to the Conjugal Partnership made up of Luis E. Nieves Piñeiro and Ivelisse Blás Toledo for special expenses incurred in the care, diagnosis, and treatment of Alicia Marie; because all of said items are special damages that were not claimed or alleged in the complaint filed.

"Thirteenth error: ...in awarding a \$25,000.00 compensation to Carmen Iris Piñeiro, the mother of Luis E. Nieves, who was the stepfather of Alicia Marie, because it is a highly unreasonable amount and is punitive in nature.

"Fourteenth error: ...in ruling that the appearing appellants incurred obstinacy ordering them to pay \$60,000.00 in attorney's fees and interest at 12%.

See Brief for codefendants-appellants Dr. Frederick A. González, Gloria Tancin de González, their Conjugal Partnership, An-

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In his *first* assignment of error, Dr. González questions the correction of the Superior Court's decision to impose liability for "medical malpractice" to the nurse anesthetists employed by Anesthesia Service III and Dr. González.

Regarding the liability of nurses for their acts or omissions, we have held that a nurse should exercise a certain standard of reasonable care to see that no unnecessary harm comes to the patient, and said standard of care should be the same as the standard of care exercised by other nurses in the locality or similar localities. *Castro v. Municipality of Guánica*, 87 P.R.R. 690, 693 (1963). "In our hospitals, the nurses and the rest of the paramedical staff have the unavoidable duty to carry out all *medical orders*, with the required promptness and pursuant to the particular circumstances of each patient." *Nuñez v. Cintrón*, 115 D.P.R. at 608[-609] [15 P.R. Offic. Trans. at 800]. (Emphasis added.)

In addition, in *Reyes v. Phoenix Assurance Co.*, 100 P.R.R. 869, 880 (1972), we issued the following warnings with regard to nurses:

"[T]he nurses that render services at the dispensaries or hospitals... should not attribute to themselves the physicians' powers. We are compelled to censure the practice of those who assume said powers at the latter's back. Their duty towards the patient and with the physician is to call the latter's attention as to the patient's symptoms and complaints. Patients deserve the painstaking and responsible

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esthesia Service III, Respiratory Care of Puerto Rico, Inc., Gloria Ayala, and María Leguillow, at 5-9.

care of the nurses of said institutions. On many occasions the nurse is the only means of communication between the physician and the patient. It cannot be permitted that the patient remain exclusively at the mercy of the nurses' whims or desires.

Coming back to this case, nurse anesthetists Ayala and Leguillow—Dr. González's employees—were assigned to operating room B where young Alicia was administered the anesthetic. At the time, they were there under the direction and supervision of Dr. Santaella, the anesthesiologist in charge. As it arises from the evidence presented, the mentioned nurses merely followed Dr. Santaella's orders (TE 9/12/1987, at 315) and *in no way participated, on their own initiative, in the process*; their intervention was limited to being present in the operating room and assisting Dr. Santaella by following her orders. At no time did the nurses present therein make a decision concerning the procedure to be followed. *No evidence was presented, either, in the sense that the mentioned nurses failed in any way to perform their duties by not following a medical order. See Berrios v. U.P.R., 116 D.P.R. 88, 101 [16 P.R. Offic. Trans. 112, 128] (1985).*⁵³ In view of this situation, we deem that plaintiff⁵⁴

53 In *Berrios v U.P.R.*, 116 D.P.R. 88 [16 P.R. Offic. Trans. 112] (1985), we held that nurses may not assume faculties that are not conferred to them by law, their position or their duty.

54 "It is a well-known fact that, as a rule, the plaintiff who brings an action for damages alleging to have suffered injuries as a result of defendant's negligence, has the burden of proving the alleged negligence." *Matos v. Adm. Servs. Médicos de P.R.*, 118 D.P.R. 567, 569 [18 P.R. Offic. Trans. 655, 658] (1987); *Vaquería Garrochales, Inc. v. A.P.P.R.*, 106 D.P.R. 799 [6 P.R. Offic. Trans. 1094]

did *not* prove the causal relation required under sec. 1802 between the nurses' acts and the child's cardiac arrest and, consequently, the irreversible brain damage. Therefore, holding Ayala and Leguillow liable for their acts does not lie. The trial court erred in so doing.

In his *third* assignment of error, Dr. González questions the trial court's decision in the sense that codefendant Gloria Santaella was his employee at the time of the accident. Dr. González is mistaken. The decision of the court *a quo*⁵⁵ that Dr. Santaella was indeed Dr. Frederick González's employee is correct and sustained by the evidence. We will *not* disturb on appeal this finding of fact made by the trier of the facts since, as we will see, it did not incur manifest error, passion, partiality (bias) or prejudice regarding the same. *Sánchez Rodríguez v. López Jiménez*, 116 D.P.R. 172, 181 [16 P.R. Offic. Trans. 214, 224-225] (1985); *Pérez Cruz v. Hosp. La Concepción*, 115 D.P.R. 721 [15 P.R. Offic. Trans. 952] (1984). Let us see.

First, it must be established that around 1981, and even before that date, there was an exclusive contract between the Hospital and Dr. Frederick González by which the latter was responsible for providing all the anesthesiologists and nurse anesthetists for the anesthesia services of Hospital de la Guadalupe.⁵⁶ Dr. Frederick González *himself* testified about the

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(1978); *Irizarry v. Water Resources Auth.*, 93 P.R.R. 404 (1966); *Morales v. Met. Pack. & Ware. Co.*, 86 P.R.R. 3 (1962).

55 See Finding of fact number 66 of the trial court judgment.

56 Dr. González had to assure the Hospital that each one of the anesthesiologists was licensed, thus, he had to submit their credentials to the Administration, and the Hospital's Credential Evalua-

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existence of the exclusive contract with the Hospital.⁵⁷ He explained that, save for exceptional cases, only he and the anesthesiologists retained by him were allowed to give anesthetics in that Hospital. Dr. González also admitted that he was a member of the Board of Directors of the mentioned Hospital. (TE 15-16/12/1987, at 352.)

That fact, by itself, is enough to uphold the correction of the trial court's finding of fact regarding the employer-employee relationship between Dr. González and Dr. Santaella. It is obvious that for a physician to render services as anesthesiologist in the Hospital, he or she had to be retained by Dr. González himself in keeping with the mentioned exclusive contract. On the other hand, the evidence presented shows that Dr. Santaella had been indeed personally hired by Dr. González and that her compensation was based on a stipulated monthly amount. It was thus testified by Dr. Santaella herself.⁵⁸ Said agreement, as testified by Dr. Santaella,

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tion Committee would study and approve the application. A similar procedure was also used for the nurse anesthetists. See Finding of fact number 64 of the trial court judgment.

57 Plaintiffs also offered in evidence a deposition taken on April 6, 1984, to Mr. José Colón Rodríguez, who was then Administrator of the Hospital de la Guadalupe. Mr. Colón Rodríguez passed away before the hearing on the case, thus, the deposition was admitted by the trial court under the provisions of Evidence Rule 64(b)(1). In this deposition, Mr. Colón Rodríguez had testified about the existence of the exclusive contract between the Hospital and Dr. González.

58 See TE 15-16/12/1987, at 11. According to Dr. González's testimony, the members of the anesthetists group did not receive

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was verbal and was never put in writing. (TE 15-16/12/1987, at 9.)⁵⁹

It bears mentioning that Dr. González's control and power were such that he made his patients believe that he would personally administer the anesthetic, although he knew that he would then select another doctor of his choice to take care and administer the anesthetic to a specific patient. In view of this, we may conclude that the patients seen by Dr. Santaella were not her own patients but the patients of Anesthesia Service III, a company controlled by Dr. González.⁶⁰ On the other hand, Dr. Santaella had no discretion as to the fees the patients were charged. Also, the anesthesia equipment that she used belonged to Anesthesia Service III or to

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wages, but a share. (TE 15-16/12/1987, at 313.) For the reasons that we will state, this assertion does not deserve our credibility.

59 The agreement between Dr. Antonia Jorge and Dr. Frederick González, however, was in writing and contains several clauses relative to days, hours, place of work, vacation leave, on call shifts, among others. Although there is no express mention of the physician's salary, the fifth clause provides that "[a]fter the first year, an increase will be negotiated depending on the quality and productivity of her work." This agreement was presented by plaintiffs as an exhibit. (See finding of fact number 66 of the trial court judgment.)

60 We say that Anesthesia Service III was controlled by Dr. González because from his own testimony it arises, for example, that Anesthesia Service III did not file an income return, but Dr. González, in his own individual income tax return, also reported the profits and income of Anesthesia Service III. (TE 15-16/12/1987, at 345-346.)

Dr. González, not to her. Dr. Santaella was not compensated for her services each time she rendered them, instead Dr. González paid her a fixed monthly salary for a pre-established work schedule.

Finally, the checks presented in evidence in the trial court by Dr. González—in an attempt to show that Dr. Santaella was not his employee—do not in any way show that he was not his employee. On the contrary, in our opinion, the amounts on the checks as “fees” are evidence of salaries received by Dr. Santaella.

The *seventh* assignment of error questions the amount awarded by the trial court to the minor Alicia Marie Santos Blás for the cost of her required daily care during her estimated life expectancy. The error assigned was not committed *in its origin*. The trial court awarded \$391,043.27 to the minor Alicia Marie for the cost of her required daily care during her estimated life expectancy. In our opinion, said amount of money was, *originally*, correct since the court accepted it based on the—undisputed—expert testimony presented by plaintiffs.

The trial court had before its consideration the testimony of expert physicians—Dr. Mirabal Font and Dr. José Alvarez Alvarez—and expert actuary, Antonio Queipo Rodríguez. Dr. Mirabal Font estimated that Alicia Marie’s life expectancy after the anoxic incident was twenty-five (25) years, which at the time of the trial was nineteen (19) years, since the trial was held six years (6) after the incident. The judge believed the testimony of Dr. Mirabal Font and concluded that the minor’s life expectancy was nineteen (19) years from the time of the trial. As explained, the girl’s life expectancy was so high because of the excellent care that she was receiving from her mother and relatives who went to enormous lengths to cooperate and to help keep the child healthy within her irreversible condition.

On a separate note, expert actuary Queipo was asked to calculate—based on the child's life expectancy as estimated by Dr. Mirabal Font and the figures offered by Dr. Alvarez—the amount of money that would be needed today for the girl's care and attention during her estimated life expectancy. In view of the expert evidence presented, Queipo was presented with three alternatives: 1) placing Alicia Marie permanently in a private hospital specialized in the care and attention of patients with severe brain damage; 2) leaving the girl in her home, hiring *three* shifts of nurses from Monday to Friday and one shift on Saturday and Sunday, and the mother would then take care of her on weekends; or 3) leaving the girl in her home and hiring nurses for two daily shifts from Monday to Friday, one shift Saturdays and Sundays, and the mother would then take the third shift during the week and on weekends.

Queipo calculated the first alternative at \$789,986.40. This sum represents the amount of money that the girl would need in order to generate \$60,000 for the next nineteen (19) years.⁶¹ This alternative was ruled out by the child's own mother since it would mean that she would be separated from her daughter, which she finds unacceptable.

The second alternative was calculated to cost \$584,295.82, which figure represents the amount of money needed today in order to generate \$44,376.70 per year for the

61 Expert witness Dr. José Alvarez estimated the cost of the patient's daily care and basic attention in an institution at one hundred and fifty dollars (\$150.00), which represents a total of fifty five thousand dollars (\$55,000) per year, plus five thousand (\$5,000) for other expenses incidental to the condition for a total of sixty thousand dollars (\$60,000) with a two (2) to three (3) percent annual increase.

next nineteen (19) years.⁶² The third alternative was calculated to cost \$391,043.27, a figure that represents the amount of money needed today in order to generate \$29,703.70 per year for the next nineteen (19) years.⁶³

The trial court adopted the third alternative, which was, actually, the less expensive. It was chosen because it was the most convenient since it allowed Ivelisse to resign from her job in order to assume one of the two weekly nurse shifts, and the compensation for said shift would take the place of her salary. Thus, she would spend more time with her daughter and would have the income needed to support herself and her daughter.

Now then, as we indicated in footnote 37, Alicia Marie died on May 18, 1992. *The sum awarded for this item must be modified by the trial court, upon receipt of the mandate, to take into account that fact, which determined the care needs of the unfortunate child.*

The *twelfth* error questions the legality of several amounts awarded to plaintiff Ivelisse Blás Toledo for the loss of income of the conjugal partnership—constituted by her and Luis Edgardo Nieves Piñeiro—due to the income reduction and the special expenses. Dr. González alleges that said items constitute special damages that were not claimed or alleged in the complaint. We do not agree.

62 Each nurse shift represents a cost of \$40.00 daily for an annual cost of \$39,628.05, plus the additional amount of \$4,675.65 for the cost of the equipment needed for her care, for a total of \$44,376.70 per year.

63 The annual cost for the nurse shifts is \$25,028.05, plus the fix amount of \$4,675.65 for the cost of the equipment, for a total of \$29,703.70.

With regard to Alicia Marie's mother, it was alleged in the Amended Complaint that "plaintiff Ivelisse Blás Toledo de Nieves, the mother of the affected minor, Alicia Marie Santos Blás, has suffered, continues to suffer now, and will suffer in the future serious and profound mental and moral anguish *and she has also been forced to resign from her job as secretary, in which she earned a \$750.00 monthly salary at the time of the events.*" (Emphasis added.) It was further alleged that "[d]ue to her daughter's condition, plaintiff Ivelisse Blás Toledo de Nieves *has become a practical nurse twenty-four hours a day, with the help of her mother-in-law, Carmen Iris Piñeiro, and of her mother, Elba Toledo, the girl's grandmother, which damages are estimated at a sum of not less than FOUR HUNDRED THOUSAND DOLLARS (\$400,000.00), including loss of earnings and suffering.*" (Emphasis added.)⁶⁴ Regarding the Conjugal Partnership in question, it was alleged in the complaint that it "had suffered losses consisting of the sums contributed by coplaintiff Ivelisse Blás Toledo de Nieves to said conjugal partnership, and also that *it has incurred and will continue to incur sustained expenses, which amount has been estimated at a sum of not less than TWO HUNDRED THOUSAND DOLLARS (\$200,000.00).*" (Emphasis added.)⁶⁵

Insofar as it is pertinent, Civil Procedure Rule 7.4 provides that "[w]hen special damages are claimed, the nature of the different items shall be specifically stated." See *Prado v. Quiñones*, 78 P.R.R. 300 (1955); *Betances v. Transportation Authority*, 73 P.R.R. 215 (1952); *Tuya v. White Star Bus*

64 See allegations numbers 55 and 56 regarding damages in the Amended Complaint.

65 See allegation number 57 regarding damages in the Amended Complaint.

Line, Inc., 59 P.R.R. 784 (1942). In *Betances v. Transportation Authority*, 73 P.R.R. 215, 217, this Court deemed that an allegation to the effect that "*plaintiff's wife has been forced to stay in bed, to receive medical attention; has been prevented from transacting her business; has suffered intense physical pain and mental anguish; and will be disabled for any kind of work...*," was sufficient to award her special damages. On that occasion, we stated the following:

We consider that the allegations contained in the fourth paragraph of the complaint, *supra*, informed the defendants that plaintiff was not making a general allegation of damages for the injuries received by his wife but that he also included therein a claim for damages for the time she lost in her occupations because of her disability to do any kind of work. It is true that said allegations are not a model of perfection and that they could have been more specific, however, it is none the less true that defendants could avail themselves of the means provided by the Rules of Civil Procedure to request a more definite statement of the damages alleged, Rule 12(e); to serve interrogatories to the adverse party, Rule 33; to submit plaintiff's wife to a physical examination, Rule 35; and they did not avail themselves of any of these remedies.

Although Rule 9(g) requires that when items of special damages are claimed they shall be specifically stated, that does not imply that an allegation as the one contained in the fourth paragraph, *supra*, may not be considered sufficient when, as in the instant case, defendants did not avail themselves of the means that the

Rules provided to secure any additional information which they wished to obtain.

Betances v. Transportation Authority, 73 P.R.R. 215, 217-218. ([Footnotes and] citations omitted.)

Following this same line of thought, we are of the opinion that the special damages awarded in the present case *were indeed alleged and claimed*, thus, we deem that the allegations about Blás Toledo and the mentioned Conjugal Partnership meet the requirements of Civil Procedure Rule 7.4. From the specific allegation in dispute, it arises that plaintiff informed defendants that she was not claiming general damages for her daughter's injuries, but that she was also including a claim for damages for having been forced to leave her job. We reach this conclusion since the situation in which Blás Toledo found herself after what happened to her daughter is specifically mentioned. That is, she was forced to leave her job and become a nurse 24 hours a day in order to take care of her daughter. On the other hand, the losses incurred by the Conjugal Partnership are also specifically mentioned in the Complaint because Blás Toledo is no longer contributing money to it.

In view of the above, it is our opinion that the trial court acted correctly in awarding the special damages since these were alleged, itemized, and proved by plaintiffs.

Now then, as we said earlier, and in view of Alicia Marie's death, *the sum of money awarded for this item must also be modified by the trial court, upon receipt of the mandate, to take into account that fact.*

VI. Discussion of the errors assigned by Hospital De La Guadalupe

The Superior Court held Hospital de la Guadalupe liable for: (1) the negligent acts of Dr. Gloria Santaella and Dr. Frederick González because of their exclusive contractual relation; (2) *keeping operating rooms with obsolete machin-*

ery and inadequate equipment, of which they were fully aware; (3) offering medical services with unauthorized personnel; (4) keeping Alicia Marie's medical records in an inefficient manner, with serious inaccuracies that revealed that they were manipulated and tampered with;⁶⁶ (5) not ordering

66 The trial court found the existence of the following inaccuracies in Alicia Marie's medical record: (1) the medical record describes the girl's condition when she was discharged from the Hospital de la Guadalupe as improved when the truth is that the girl left the Hospital in a comatose state; (2) it indicates that the girl had had electrocardiograms (E.K.G.) made when the truth is that a full E.K.G. was never done, thus there are no results of said study in the record (there are only tracings of a single lead made in the intensive care unit); (3) the pages of the record relative to the girl's admission to Hospital de la Guadalupe indicate that she was in the intensive care unit under the care of Dr. Zayas, when the truth is that when she was admitted to the Hospital, the girl was assigned a room in the fourth floor and was not admitted to the intensive care unit until after the incident in operating room B; besides, those record sheets are signed by the surgeon, Dr. Menéndez, who did not see the girl on the day that she was admitted to the Hospital, rather he saw her for the first time on the following day when she was already in the operating room; (4) the medical record sheets relative to the recovery room care are schematic and inefficient because they do not show that the medical orders presumably given by Dr. Santaella and Dr. Zayas were complied with; (5) the first entry in the progress notes is an admission note written and signed by Dr. Ferdinand Menéndez and dated November 15, 1981, when the evidence established that Dr. Menéndez did not see the girl until November 16, when she was taken to the operating room; (6) the third entry in that same page of the medical record was apparently handwritten by Dr. Menéndez himself, but the handwriting in this entry substantially differs from the handwriting

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the transfer of the child to an institution with the necessary equipment and personnel to take care of her condition after the incident; and (6) having left the child in an intensive care unit that lacked the necessary equipment in order to cover up the incident in the operating room and the serious condition in which she was left.⁶⁷ The Hospital has appealed from said judgment assigning several errors.⁶⁸

[Footnote continued from previous page]

in the first entry which was supposedly also made by Dr. Menéndez; (7) it indicates that, with the approval and recommendation of Dr. Frederick González, the girl was in the intensive care unit assigned to a Dr. Negrón and to a nurse anesthetist, when the truth is that the alleged Dr. Negrón was not a physician, but a student in the respiratory therapy school that Dr. Frederick González runs at Hospital de la Guadalupe and that the so-called nurse anesthetist was a student receiving training in Dr. Frederick González's school of anesthetists; (8) that in the certified copy of the record obtained from the Hospital by plaintiff, at the beginning of the action, the consent form spaces that described the nature of the procedure had not been completed, while in the original consent form, offered in evidence at the trial, these spaces appear filled-in on a typewriter different to the one used for the rest of the text.

67 See the trial court judgment at 110 to 112.

68 The Hospital assigned the following errors to the trial court:

"1 in denying defendant-appellee's motion requesting additional findings of fact under the provisions of Rule 43.3 of Civil Procedure.

"2 in finding that the liability assigned to the codefendant Hospital is covered under the hospital and professional liability policy and under the general civil liability coverage.

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In its *first* assignment, the Hospital alleges that the trial court erred in denying appellant's motion requesting additional Findings of Fact pursuant to the provisions of Civil

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"3 in finding that Dr. Roberto Bengoa acted in a negligent and careless manner straying from the generally accepted rules of the medical profession.

"4 in finding that Hospital Nuestra Señora de la Guadalupe acted in a negligent and careless manner, both as to the attention and medical hospital care that it should have provided its patient as well as to its obligation to keep adequate facilities and having the equipment and instruments necessary to take care of a child or patient in a crisis, and in not having the entire staff properly trained, especially the staff assigned to its operating rooms, recovery rooms, and intensive care unit.

"5 in ordering defendants to pay \$500,000.00 to the minor Alicia Marie Santos Blás for the physical and mental damages caused to her and which she continues to suffer.

"6 in ordering defendants to pay \$800,000.00 for the suffering and anguish of coplaintiff Ivelisse Blás Toledo, to pay \$300,000.00 for the suffering and mental anguish of coplaintiff Luis Santos Colón, and to pay \$50,000.00 for the suffering and mental anguish of coplaintiff, the stepfather of Alicia Marie, Luis Nieves Piñeiro.

"7 in ordering plaintiffs [sic] to pay \$25,000.00 to the succession of Efrain Santos Rivera, Alicia Marie's paternal grandfather who, at the time of the trial, had passed away. The court also erred in ordering payment of the same amount to the succession of Elba Toledo who, at the time of the trial, had passed away, for her suffering and mental anguish."

See Brief for Hospital Nuestra Señora de la Guadalupe and Corporación Insular de Seguros at 5-7.

Procedure Rule 43.3 (32 L.P.R.A. Ap. III R. 43.3). Insofar as it is pertinent, this Rule provides that:

It shall not be necessary to request findings of fact for the purposes of an appeal or review, but, upon motion of a party filed not later than ten (10) days after entry of copy of the notice of judgment, the court *may* make the corresponding initial findings of fact or conclusions of law, if they were not made because they were not necessary pursuant to rule 43.2, or it *may* amend or make additional findings, and it *may* amend the judgment accordingly.

It is obvious, from the clear letter of the cited provision, that the trial court *is not obligated* to make additional Findings of Fact and Conclusions of Law upon motion of a party, if these are not pertinent. The use of the word "may" gives the judge discretion to decide if these should or should not be drawn. In view of this, we apply the hermeneutic rule laid down in sec. 14 of our Civil Code, 31 L.P.R.A. § 14, in the sense that "when a law is clear and free from all ambiguity, the letter of the same shall not be disregarded, under the pretext of fulfilling the spirit thereof." *Col. Int'l Sek P.R., Inc. v. Escriba*, 135 D.P.R. 647, 660 [35 P.R. Offic. Trans. ____] (1994).

In the case at bar, the trial judge's findings of fact were detailed, complete, and thorough. After examining the Hospital's motion for additional findings of fact, we deem that the trial court was correct in denying the petition. On the other hand, the Hospital's allegation in the sense that the additional findings sought would change or alter the conclusion regarding the Hospital's liability is totally unwarranted.

In its *second* assignment, the Hospital alleges that the trial court erred in finding that the Hospital is covered by a hospital professional liability policy and by a general civil liability coverage. With regard to the substantive aspect of

this assignment, we are compelled to refrain from discussing the same for one single reason, that is, the insurance contract, which is the law between the parties, was not included as part of the appendix to this petition.⁶⁹ Thus, the appellant Hospital has not placed us in a position to express our point of view with regard to this matter.

In its *third* error, the Hospital alleges that the Superior Court erred in finding that "Doctor" Bengoa acted in a negligent manner. When the events in this case took place, "Doctor" Bengoa was an employee of Hospital de la Guadalupe working as medical clerk or medical assistant. (TE 9/12/1987, at 198.) He had been hired by the mentioned hospital as physician, but he was not licensed to practice medicine in Puerto Rico. As it arises from his own testimony, he had taken the medical board exams and had failed to pass them. (TE 9/12/1987, at 195.) His work in the Hospital was to prepare medical histories and do physical examinations of the patients in floors three and five of the Hospital (TE 9/12/1987, at 199). He received a five-dollar compensation for each patient that he examined. Most of the time, he saw patients without any supervision from an authorized physician. (TE 12/9/1987, at 200.)

The medical record shows that on November 15, 1981, the day before the operation, Alicia Marie was examined in the Hospital by "Doctor" Bengoa, who did a complete physical examination and diagnosed tonsillitis and adenoiditis. This diagnosis was entered in Alicia Marie's record. How-

69 The Petition for Review filed by the appellant Hospital has only three appendices, to wit: 1) Judgment of November 28, 1988; 2) Motion for Additional Findings of Fact Pursuant to Rule 43.3 of the Rules of Civil Procedure; and 3) Trial Court Order dated December 16, 1988, and notified on December 20, 1988.

ever, the evidence presented in the trial court reveals several discrepancies in the record. In the record, "Doctor" Bengoa reports that the girl was in the intensive care unit under Dr. Zayas's care when he examined her. This statement is inconsistent with the evidence presented which showed that when the girl was admitted on the morning of November 15, 1981, she was assigned to room 404 of the Hospital, and, therefore, it is impossible that the girl would be in the intensive unit when "Doctor" Bengoa examined her. It is an inescapable fact that the girl was transferred to the intensive care unit on the following day, after the operation when the incident occurred. We believe, like the trial judge, that the reason for this inconsistency is that "Doctor" Bengoa did not make any report on the day he examined the girl, and it was not entered in the medical record until a later date.⁷⁰

These inconsistencies move us to think that Alicia Marie's record could have been tampered with subsequently and that both "Doctor" Bengoa and the Hospital were negligent for having made or allowed altered entries in the record. However, mere faults in the care taken when keeping medical records do not by themselves imply negligence. In this regard, in *Pérez Cruz v. Hosp. La Concepción*, 115 D.P.R. 721, 731-732 [15 P.R. Offic. Trans 952, 966], we held that:

In the past we have censured, with great concern, the slackness in the keeping of the medical record. We must insist on this. It reduces

⁷⁰ It is also worth emphasizing that the sheets of the record at issue with the incorrect information also bore Dr. Menéndez's signature. The evidence established that Dr. Menéndez did not visit the Hospital or saw the child on that date, he saw her for the first time on November 16, 1981, when she was already in the operating room.

the usefulness of the medical record which can no longer serve the purpose of punctually informing about the fulfillment of the physician's orders, nor be a source of reference for the evaluation of the treatment and care administered to the patient. *López v. Hosp. Presbiteriano, Inc.*, *supra*, at 216-217. Moreover, we have given said omission legal consequences "[i]n view of the almost total lack of credibility which the records presented in evidence deserve from us; in view of the fact that some of them were altered ... this is a case where it is proper to make, with regard to the hospital, [an] inference of negligence which renders the rule of *res ipsa loquitur* applicable." *Oliveros v. Abreu*, 101 D.P.R. 209, 230 (1973). The absence of said entries in the record does not necessarily constitute negligence per se. However, said omission could be a factor to be considered when judging the physician's credibility with regard to the treatment he administered to the patient. *Reyes v. Phoenix Assurance Co.*, 100 P.R.R. 869, 878-879 (1972).⁷¹ [Emphasis added.]

It is a well-known fact that for a damage action to succeed under sec. 1802, three requirements must be met: 1) the damage; 2) the negligent or wrongful act or omission; and 3) the causal relation between the damage and the mentioned negligent or wrongful act or omission. *J.A.D.M. v. Centro Com. Plaza Carolina*, 132 D.P.R. 785, 795 [32 P.R. Offic. Trans. ___, ___] (1993); *Hernández v. Fournier*, 80 P.R.R.

⁷¹ See also, *Rodríguez Crespo v. Hernández*, 121 D.P.R. 639, 661 [21 P.R. Offic. Trans. 637, 655-656] (1988).

94, 96-97 (1957). In cases of alleged medical malpractice, plaintiff must prove, through a preponderance of evidence, that the medical treatment administered by defendant, or the failure to provide the correct and indicated treatment was what most probably caused the injury suffered by the patient. *Rodríguez Crespo v. Hernández*, 121 D.P.R. at 650 [21 P.R. Offic. Trans. at 646]; *Riós Ruiz v. Mark*, 119 D.P.R. 816 [19 P.R. Offic. Trans. 862]; *Cruz v. Centro Medico de P.R.*, 113 D.P.R. 719, 744 [13 P.R. Offic. Trans. 931, 960] (1983); *Zambrana v. Hospital Santo Asilo de Damas*, 109 D.P.R. 517, 521 [9 P.R. Offic. Trans. 687, 692] (1980). It must be kept in mind, also, that the causal relation between the damage and the negligent act is not established based on a mere speculation or conjecture. *Ramos, Escobales v. Garcia, González*, 134 D.P.R. 969 [34 P.R. Offic. Trans. ____] (1993).

In view of the above, we must conclude that "Doctor" Bengoa's actions were questionable. However, in order to be able to find him liable for his actions, plaintiffs had to prove the existence of a causal relation between "Doctor" Bengoa's actions and the damage suffered by the child. In other words, as required by sec. 1802, it had to be established that "Doctor" Bengoa's action was what most probably caused the damage.

After an analysis of the evidence and of the testimony of said physician, we deem that the physical examination made by "Doctor" Bengoa, his diagnosis, and the inconsistencies found in the medical record and caused by him, in no way contributed to the damage suffered by Alicia Marie. Since plaintiffs did not show that "Doctor" Bengoa's examination of the child was what most probably caused the damage suffered by her, we cannot hold "Doctor" Bengoa liable; therefore, the cause of action raised against him under sec. 1802 is not actionable. *In this respect*, we agree with the appellant Hospital.

Notwithstanding this determination, we are of the opinion that the Hospital was indeed negligent in the attention and medical care provided to Alicia Marie and in breaching its obligation to maintain in an adequate condition its physical facilities and its necessary medical equipment. First, we must recognize that under our law in force hospitals must exercise the care and take the precautionary measures that a "reasonable and prudent" man would take under specific circumstances, and provide to its patients the medical attention required by their condition. *Márquez Vega v. Martínez Rosado*, 116 D.P.R. 397 [16 P.R. Offic. Trans. 487] (1985); *Crespo v. H.R. Psychiatric Hosp., Inc.*, 114 D.P.R. 796, 800 [14 P.R. Offic. Trans. 1027, 1031] (1983); *Lopez v. Hosp. Presbiteriano, Inc.*, 107 D.P.R. 197 [7 P.R. Offic. Trans. 217] (1978); *Oliveros v. Abréu*, 101 D.P.R. 209 [1 P.R. Offic. Trans. 293]; *Hernández v. The Capital*, 81 P.R.R. 998, 1005 (1960). The practice generally recognized by the very medical profession may be used as an indicator for determining what that care should be. *Crespo v. H.R. Psychiatric Hosp., Inc.*, 114 D.P.R. at 800 [14 P.R. Offic. Trans. at 1032].

Also, it must be pointed out that "§ 1802 [mentioned above] inevitably centers around the function of the person's foresight, as controlling factor of his liability toward his fellowmen." *Rivera Pérez v. Cruz Corchado*, 119 D.P.R. 8, 18 [19 P.R. Offic. Trans. 10, 21] (1987). (Emphasis omitted.) "This does not mean, of course, that the person is obliged to foresee all possible risks that can be conceived in a particular situation, since it then would become an absolute liability." *Pacheco v. A.F.F.*, 112 D.P.R. 296, 300 [12 P.R. Offic. Trans. 367, 372]. "The duty of foreseeability does not extend to all the hazards imaginable which could conceivably threaten the . . . security but to those . . . which can be anticipated by a prudent person." *Hernández v. The Capital*, 81 P.R.R. at 1005; *Community Partnership v. Pres. Hosp.*, 88 P.R.R. 379 (1963). The hospital will be liable if a damage

occurs that, in the particular circumstances of the case, could reasonably have been foreseen and prevented. *Hernández v. The Capital*, 81 P.R.R. at 1005; *Lozada v. E.L.A.*, 116 D.P.R. 202, 215 [16 P.R. Offic. Trans. 250, 265] (1985).

In *Lozada* at 213 [16 P.R. Offic. Trans at 262-263], we discussed the liability incurred by hospitals that breach their duty to have a specific medical equipment. In that respect, we held:

Although we strive for excellence in the medical profession, the determination of what constitutes negligence, by the existence or absence of a given equipment, is necessarily dependent on different factors. This formula is logical because "in establishing the rule we must and we want to be just and reasonable. We are not going to demand requirements or conditions which render impossible the practice of medicine in Puerto Rico or which render the medical services economically prohibitive." *Oliveros v. Abréu*, 101 D.P.R. 209, 226 (1973).

In order to determine if in the case at bar the State had the obligation to have an arteriographic equipment in the Department of Urology of the Regional Hospital, as the place where renal biopsies are performed—the main premise upon which the trial court fixed liability—we should consider that obligation within the context of foreseeability, and the guiding element that complements it: reasonableness. The latter, in turn, depends on additional factors such as hardship, need, resources, and above all, the acknowledgment and acceptance of alternate procedures by the medical profession. [Emphasis added.]

Going back to the case at bar, we ask ourselves if—in light of the mentioned caselaw—a situation like that which occurred to Alicia Marie (complications resulting from the administration of the anesthetic) was *foreseeable*, and whether, within that factual framework, it was *reasonable* to require the Hospital to have the *vital basic equipment* to handle an emergency of this kind. *We answer both questions in the affirmative.* After making a thorough analysis of the oral and expert evidence on record, we conclude that it is clear that the operating rooms of Hospital de la Guadalupe did not have such vital equipment, especially the necessary equipment to perform surgery and to handle emergencies involving children. *It was established that the equipment that was not available in the operating room was not a sophisticated or specialized equipment that is seldom used, but the basic equipment that must be available in all hospital operating rooms.* Furthermore, as shown by the evidence presented, the acquisition of said equipment did not involve a big investment.

According to Dr. Santaella's testimony, the machine used in operating room B to administer the anesthetic to Alicia Marie did not have an indispensable accessory to determine whether the patient was receiving the required oxygen. (TE 15-16/12/1987, at 34-37.) On this point, Dr. Matta—plaintiffs' expert anesthesiologist—opined that the use of an anesthesia machine that does not have an oxygen analyzer entails such a high risk that it constitutes "a barbaric act," and its use in those circumstances is inconceivable. (TE 17/12/1987, at 587.)⁷² Doctor Santaella, in turn, testified

⁷² Dr. Belisario Matta—whose subspecialty is intensive care—explained to the trial court what is an anesthesia record and its importance. Doctor Matta stated that the most important thing about that record is the chronological entry of every event that occurs

that in the mentioned operating room there was no defibrillator, an instrument necessary to deal with an emergency situation that involves a cardiac arrest, like the one that occurred in this case. Neither was there any equipment for taking the

[Footnote continued from previous page]

during the anesthesia administration procedure, and underscored the importance of keeping a truthful and adequate record that shows exactly what is happening throughout the entire anesthesia administration procedure. When he was shown the anesthesia sheet prepared with regard to the accident suffered by Alicia Marie, he pointed out the following flaws: (1) the sheet does not contain or show the amount of halothane or the proportion of halothane and oxygen administered to the patient; (2) the remarks on the anesthesia sheet graphic are not chronologically related to the entries made in the column to the right, which explains the contents of the graphic; (3) the inconsistencies between the graphic and the explanation column are such that while the graphic shows that the girl's heart rate ranged from 60 to 220 beats per minute, the remark in the column reports that the child suffered a cardiac arrest which required cardiac massage; and (4) while the graphic shows 210 heartbeats per minute, the remark in the column reports that the girl was given adrenaline, a medication used to stimulate and increase the heart rate.

In Dr. Matta's opinion, if a situation involving a cardiac arrest is not adequately handled, blood oxygenation problems occur which lead to a period of brain anoxia. If said state of anoxia lasts more than 3-5 minutes, it produces a brain edema that translates into irreversible brain damage such as that caused to Alicia Marie. Doctor Matta concluded that for Alicia Marie to have suffered such severe brain damage, she must have been without oxygen or adequate oxygenation, definitely and with medical certainty, for more than five minutes.

child's blood pressure or for determining the adequate perfusion of her vital organs. (TE 15-16/12/1987, at 43.) In her statement at the witness stand, Dr. Santaella admitted that had she had the adequate equipment, she would have had the opportunity to detect and deal better with the child's emergency. (TE 15-16/12/1987, at 187-190)⁷³

On the other hand, we agree with the trial court that it was established that the Hospital was well aware that the machines used in the operating rooms were rudimentary and deficient, *inasmuch as Dr. Santaella herself testified that since 1979 she had repeatedly reported to Dr. González and to the Hospital's medical director the need to have in the operating rooms the necessary equipment to handle emergency situations arising during anesthesia administration procedures.* (TE 15-16/12/1987, at 24.) Doctor González admitted at the witness stand that he had indeed received Dr. Santaella's complaints about the lack of equipment. (TE 15-16/12/1987, at 450.) The trial court gave credibility to Dr. Santaella's testimony. We shall *not* disturb on appeal said finding of fact and credibility absent manifest error, passion, prejudice, or partiality. *Sánchez Rodríguez v. Lopez Jiménez*, 116 D.P.R. 172 [16 P.R. Offic. Trans. 214]; *Perez Cruz v. Hosp. La Concepción*, 115 D.P.R. 721 [15 P.R. Offic. Trans. 952].

In keeping with our caselaw in force, if the Hospital knew about the equipment deficiencies, it was its responsibility to act as a "prudent and reasonable man." Had it done so, it would have foreseen that if it did not acquire the necessary

73 As we can see from the judgment of the trial court, none of the defendants could explain to the satisfaction of the court why Hospital de la Guadalupe kept using such inadequate equipment in its operating rooms. (See Finding of Fact number 32 of the trial court judgment.)

equipment, an emergency might arise that might not be properly handled due to the lack of instruments necessary to help a patient in a crisis. Therefore, in our opinion, the damage caused to Alicia Marie was, to a great extent, caused by the lack of necessary equipment to care for her before and after her cardiac arrest. We conclude that the Hospital was negligent in not having the necessary equipment. In view of the above, plaintiffs proved the existence of the necessary elements to hold the Hospital liable under sec. 1802.

VII. Discussion of the errors assigned by Dr. Ferdinand Menéndez

The trial court found that Dr. Menéndez, an otorhinolaryngologist, incurred negligence because his acts towards Alicia Marie strayed from the recognized best medical practice standards.⁷⁴ Aggrieved by the trial court decision,

⁷⁴ In conclusion of law number 5, the trial judge stated the following with regard to Dr. Menéndez's actions:

"[A]t no time during the girl's visits to his office did [Dr. Menéndez] take a complete medical history of her; he did not make a complete physical examination of her; he simply trusted Doctor Hidalgo's referral. Neither did he contact Dr. Hidalgo in any manner to acquaint himself with Alicia Marie's medical history and physical condition, taking for granted, in a negligent manner, that the girl met the necessary medical and pediatric requirements to undergo an operation [to remove] her amygdalae and adenoids.

"Doctor Menéndez recognized the Treatuse *Otorhinolaryngology by Paparella* as an authority on his field of specialization (Paparella & Shumrick Vol. 3, pages 296-301, W.B. Saunders Co., 1973 edition) (Exhibit IX for Plaintiffs). On the witness

Dr. Menéndez sought review before this Court, assigning four errors.⁷⁵ He basically questions the liability imposed on him for what happened to Alicia Marie, the degree of liability, and the amount awarded to appellees.⁷⁶

In his first assignment, Dr. Menéndez questions whether the operation performed on the minor Alicia Marie was so

[Footnote continued from previous page]

stand, he admitted that according to said Treatise, the absolute indications for such operations were not present”

75 Doctor Ferdinand Menéndez assigned the following errors to the trial court:

“A. whether the operation performed on the minor Alicia Marie Santos Blás was so contraindicated by the medical authorities that performing it would constitute professional malpractice.

“B. whether the proximate cause of the problem that arose in the case of the child Alicia Marie Santos Blás during the anesthesia administration procedure was the surgeon’s medical intervention.

“C. whether the percentage of negligence attributed to Dr. Ferdinand Menéndez is proportional to that [attributed to] the other codefendants.

“D. [whether] [t]he damages awarded in this case are excessive and should be modified.”

See Brief for Appellant Doctor Ferdinand Menéndez at 4.

76 The record indicates that Dr. Menéndez signed a compromise agreement by which he chose not to continue his defense against appellees and agreed to execute his insurance coverage in the amount of \$100,000, remaining in the case pending adjudication of the contribution actions with regard to the other codefendants. (See the judgment sought to be reviewed at 107 and 124.)

contraindicated by the medical authorities that performing it constituted medical malpractice. *Our answer is yes.*

Appellant Dr. Menéndez *recognized* the text by Paparella, *supra*, as an authority on otorhinolaryngology. (TE 2-5/12/1987, at 322.) Appellant stated that according to said treatise, there are five absolute and relative criteria for performing a tonsillectomy. (*Id.* at 380.) He also *admitted* the existence of several other criteria that contraindicate said operation. Doctor Menéndez testified in court that Alicia Marie met only two of all the criteria established for performing said operation: chronic infections, and obstruction. (*Id.*)

We do not agree. The evidence presented by Dr. Menéndez himself clearly indicates—according to the text by Paparella—that in children whose condition was similar to that of Alicia Marie, the *tonsillectomy was contraindicated*. His testimony also shows that he *never* examined Alicia Marie's medical record *or* ran any tests to confirm the need for the operation. Appellant *never* contacted Dr. Hidalgo, the child's pediatrician. Therefore, he never had the benefit of acquainting himself with the child's full medical history to ascertain whether the operation was convenient for her and whether her state of health was adequate for surgery. This omission by Dr. Menéndez led him to perform an operation that was contraindicated, which fact, in turn, shows that he did not act as a prudent and reasonable man. The error assigned was not committed.

VIII. Discussion of the errors assigned by more than one appellant

We shall now discuss the errors assigned by more than one appellant and which, by their nature, may be discussed together.⁷⁷

Dr. Santaella and Dr. González—in their assignments of error number *ten* and *two*, respectively—question the liability imposed on Respiratory Care of P.R., an insured of appellant

77 The errors assigned by the Patient's Compensation Fund Administration—which we have not discussed yet because they were also assigned by other appellants and we will discuss them together—are the following:

- "1. awarding plaintiff Ivelisse Blás Toledo the excessive sum of \$800,000.00.
- "2. awarding plaintiff Luis Santos Colón the excessive sum of \$300,000.
- "3. awarding Luis Edgardo Nieves Piñero the sum of \$50,000.
- "4. awarding Luis Santos Colón the sum of \$25,000 as heir of Efrain Santos Rivera.
- "5. awarding plaintiff Ivelisse Blás Toledo the sum of \$6,250.00 as heiress of Elba Toledo.
- "6. ordering defendants to pay attorney's fees.
- "7. including defendant Patient's Compensation Fund Administration, which is part of the sovereign, in the solidarity payment of the judgment.
- "8. failing to draw a specific finding of fact—which was requested—in the sense that the Patient's Compensation Fund Administration is solely liable for the amount of its policy and cannot be ordered to pay interest or attorney's fees.

See the Brief for appellant Patient's Compensation Fund Administration at 2.

Universal Insurance Company. Appellants allege that Respiratory Care of P.R. is not liable because it rendered anesthesia services through competent graduate nurses, and because plaintiffs did not prove that Alicia Marie had arrived at the care of said entity without the damage that finally affected her capacity.

From the evidence presented in the trial court it clearly arises that Respiratory Care of P.R., Inc.—controlled by Dr. Frederick González—acted in a negligent manner by assuming Alicia Marie's care despite the fact that it did not have the necessary equipment and adequate staff to provide the care she needed. According to the record, Respiratory Care of P.R., Inc. was involved with Alicia Marie in the operating room, *after the incident that caused the irreversible damage to Alicia Marie had occurred, and, later on, in the intensive care unit.* (TE 15-16/12/1987, at 159-161.)

As we have mentioned earlier (at __ and __ of this Opinion), after the crisis in the operating room, Dr. Santaella ordered that the child's condition be closely monitored. The medical record of Alicia Marie, however, shows that Respiratory Care's staff did not strictly obey said orders.

Notwithstanding the above, said actions are not related to the damage suffered by the minor. All the evidence in this case points to the fact that the child suffered the irreversible damage in the operating room. It was not shown that said damage could have been subsequently aggravated. Therefore, we conclude that Respiratory Care of P.R. and/or its employees should not be held liable for acts that took place after the damage caused to the minor.

The pediatrician, Dr. Hidalgo, and the otorhinolaryngologist, Dr. Menéndez, make reference—in their assignments of error number *five* and *three*, respectively—to the percentage of liability attributed to each of them by the trial court. Doctor Hidalgo specifically questions the correctness of the percentage of negligence attributed to him, who was

not present during the incident in the operating room, when compared to the percentage attributed to Dr. Menéndez, who was indeed present in the operating room during the incident. The trial court ruled that Dr. Hidalgo was liable for 20% of the negligence, while it ruled that Dr. Menéndez was 10% liable.

From the outset we clarify that, according to the trial court judgment, the percentage of negligence attributed to Dr. Menéndez was *not* for his actions at the time of the incident in the operating room, *but for his negligent omissions before the operation, which led him to decide to operate on the child even though such operation was contraindicated*. Doctor Hidalgo, in turn, contends that he did not participate in the decision to operate on the child or to select the place where such operation would take place; and that neither was he in the operating room when the incident occurred. Based on this, he contends that the trial court erred in imposing on him a 20% liability for the damage sustained by the minor. Doctor Hidalgo alleges that said percent of negligence should have been imposed on Dr. Menéndez, inasmuch as it was Dr. Menéndez who made the decision to operate on the girl.

Earlier in this opinion we mentioned in detail the negligent actions of Dr. Hidalgo. We understood—as the trial court did—that had it not been because Dr. Hidalgo signed Alicia Marie's medical clearance, probably she would not have been operated on. He knew about her delicate medical condition, and he knew, or should have known, that the operation was contraindicated under well-recognized pediatric criteria. It was Dr. Hidalgo, with his lack of diligence and his omission, who triggered the chain of events that placed the child in the operating room exposing her to suffer a damage. Had he discharged his duty *as advocate of the child's interests*, she would not have arrived at the operating room, since the otorhinolaryngologist would not have scheduled the operation without said pediatrician's approval.

We have already mentioned the negligent acts attributed to Dr. Menéndez: failing to contact the child's pediatrician to discuss her clinical history and the treatment alternatives for the minor's symptoms (TE 2-5/12/1987, at 395). *Doctor Menéndez admitted that, according to Paparella's text, the operation was contraindicated [illegible] admitted that he never examined Alicia Marie's record.* Furthermore, he [illegible] although he stated in the record that he had examined Alicia Marie, he did not [illegible] testified that he knew that "Doctor" Bengoa did not have a license. It also [illegible] the evidence that Dr. Menéndez was a member of the Hospital's medical [illegible] director of the Otorhinolaryngology Department. As director of the Otorhinolaryngology Department, *he knew, or should have known about the poor condition of the operating rooms and the lack of pediatric equipment there.* Nonetheless, he scheduled Alicia Marie's operation in the Hospital.

In view of the above and of the previous pronouncements we have made here with regard to—the negligence incurred by Dr. Hidalgo and Dr. Menéndez, we are of the opinion that their negligent actions contributed *in the same proportion* to the damage suffered by Alicia Marie, and that, therefore, a 15% liability should be equally imposed on each doctor. The judgment below shall be *modified* to such ends.

The pediatrician, *Dr. Hidalgo*, and the anesthesiologists, *Dr. Frederick González* and *Dr. Gloria Santaella*—in their assignments of error number *sixth*, *fourteenth*, and *eighth*, respectively—question the juridical correctness of the trial court ruling that orders defendants to pay the costs, attorney's fees, and prejudgment interest.

Insofar as it is pertinent, Civil Procedure Rule 44.1 (32 L.P.R.A. App. III), provides the following with regard to the costs and attorney's fees:

44.1 *Costs and attorney's fees*

(a) *To whom awarded.* Costs shall be allowed to the prevailing party, except when otherwise directed by law or by these rules. The costs which may be allowed by the court are those expenses necessarily incurred in prosecuting an action or proceeding which, according to law or to the discretion of the court, one of the parties should reimburse to the other.

(b) . . .

(c) . . .

(d) *Attorney's Fees.* In the event any party or its lawyer has acted obstinately or frivolously, the court shall, in its judgment, impose on such person the payment of a sum for attorney's fees which the court decides corresponds to such conduct.

In the leading case *Fernández v. San Juan Cement Co., Inc.*, 118 D.P.R. 713, 717-71[8] [18 P.R. Offic. Trans. 823, 829] (1987), we were lavish in our expressions regarding attorney's fees and their legality. Below we quote some examples:

Assessment of attorney's fees is discretionary, *Raluan Corp. v. Feliciano*, 111 D.P.R. 598 (1981), but Rule 44.1(d) of Civil Procedure clearly establishes that when a party has been obstinate, the court *shall* impose payment of a sum for attorney's fees in its judgment. Assessment of attorney's fees is mandatory whenever obstinacy is determined. *Montañez v. Metropolitan Constr. Corp.*, 87 P.R.R. 35 (1962); *Ortiz v. Martorell*, 80 P.R.R. 525 (1958); *Castro v. Payco, Inc.*, 75 P.R.R. 59 (1953); *Font v. Pastrana*, 73 P.R.R. 238 (1952); *Hernández v. Caraballo*, 74

P.R.R. 27 (1952); *Stella v. Bonilla*, 65 P.R.R. 508 (1946).

[...]

Rule 44.1 (d) of Civil Procedure does not expressly define "obstinacy."

A commentator has said that "obstinacy is an attitude which casts its shadow over the proceeding and which affects the sound operation and administration of justice. It also subjects the innocent litigant to the ordeal of the judicial process and unnecessary costs, and to retainment of professional services, including attorneys, with the usually exorbitant burden to his pocket." H. Sánchez, *Rebelde Sin Cosas*, IV-2 Boletín Judicial 14 (1982).

The concept of "obstinacy" has been broadly defined in our caselaw. In general terms, any behavior that forces a litigation that could have been avoided, that needlessly prolongs a litigation, or that obliges the other parties to embark on needless procedures is considered obstinate. *Torres Ortiz v. E.L.A.*, 136 D.P.R. 556 [36 P.R. Offic. Trans. ____] (1994); *Elba A.B.M. v. U.P.R.*, 125 D.P.R. 294 [25 P.R. Offic. Trans. ____] (1990); *Hawayek v. A.F.F.*, 123 D.P.R. 526 [23 P.R. Offic. Trans. 459] (1989); *Colondres Vélez v. Bayrón Vélez*, 114 D.P.R. 833 [14 P.R. Offic. Trans. 1072] (1983); *Insurance Co. of P.R. v. Superior Court*, 100 P.R.R. 404 (1972).⁷⁸

⁷⁸ See also; *Fernández v. San Juan Cement Co., Inc.*, 118 D.P.R. 713 [18 P.R. Offic. Trans. 823] (1987); *San Antonio v. Jiménez & Fernández Sucrs.*, 63 P.R.R. 206, 211 (1944); *Ortiz v. Viera*, 59 P.R.R. 358 (1941); *McCormick v. Vallés*, 55 P.R.R. 219, 225-226 (1939); and *Stella v. Bonilla*, 65 P.R.R. 508 (1946).

The purpose of imposing attorney's fees in obstinacy cases is "to impose a penalty upon a losing party that because of his stubbornness, obstinacy, rashness, and insistent frivolous attitude has forced the other party to needlessly assume the pains, costs, efforts and inconveniences of a litigation." *Fernández v. San Juan Cement Co., Inc.*, 118 D.P.R. at 718 [18 P.R. Offic. Trans. at 830]; *Soto v. Lugo*, 76 P.R.R. 416 (1954). Furthermore, the imposition of attorney's fees, and of the prejudgment interest, seeks to discourage unnecessary litigation and to encourage the settlement of actions by imposing sanctions on the obstinate party to compensate the economic harm and the annoyance suffered by the other party. *Pérez v. Col. Cirujanos Dentistas de P.R.*, 131 D.P.R. 545 [31 P.R. Offic. Trans. __] (1992); *Elba A.B.M. v. U.P.R.*, 125 D.P.R. 294 [25 P.R. Offic. Trans. __]; *Insurance Co. of P.R. v. Superior Court*, 100 P.R.R. 404. This makes viable and guarantees the just, speedy, and inexpensive solution of the matter under the consideration of the Court.

In *Fernández*, this Court, citing previous caselaw, summarized the circumstances in which obstinacy exists: 1) answering a complaint and denying total liability, even if it is accepted later on; 2) raising undue defenses in the action; 3) believing that the amount sought is excessive, that being the only reason to oppose plaintiff's petition, and not admitting frankly his liability, limiting the controversy to fixing the sum to be awarded; 4) running the risk of litigating a case in which liability is *prima facie*; and 5) denying a fact knowing that it is true.

Now then, with regard to the assessment of attorney's fees by trial courts, in *Corpak, Art Printing v. Ramallo Brothers*, 125 D.P.R. 724, 738 [25 P.R. Offic. Trans. , __] (1990), we held that such fees:

[M]ay take into consideration factors such as the nature of the action, the questions of law involved, the amount at issue, the time spent,

the efforts and professional activity needed for the case, and the skills and reputation of the lawyers involved, *Serrano v. Lugo*, 83 P.R.R. 290, 293 (1961); *Pan American v. Superior Court*, 100 P.R.R. 411, 418 (1972); *Veve v. Municipality of Fajardo*, 18 P.R.R. 738, 744-745 (1912)—we must bear in mind that the degree or intensity of the obstinate or frivolous conduct is the test or determining or critical factor to be considered by the courts when calculating the attorney's fees that the obstinate or frivolous losing party shall bear... [Emphasis omitted.]

Under the above doctrine, we must determine whether defendants—except for the Patient's Compensation Fund Administration, whose situation we will address below—were obstinate in this case.

After a thorough analysis of the evidence, we hold that defendants were obstinate. All of them knew, or should have known, that their negligence contributed to the damage caused to Alicia Marie, and, anyway, denied such fact; they conducted discovery proceedings, and forced plaintiffs to do the same and to extensively litigate their case. Furthermore, defendants-appellants, as shown by the evidence on record, denied and concealed facts, delayed the proceedings, tampered with documents, and forced plaintiffs to incur exorbitant expenses by litigating the case for so many years.

On the other hand, under our caselaw the imposition of costs is mandatory against the losing party. *Colondres Vélez v. Bayrón Vélez*, 114 D.P.R. at 839 [14 P.R. Offic. Trans. at 1079]. Based on this caselaw, and on the mentioned Rule 44.1 of Civil Procedure, there is no doubt that the trial court acted correctly in ordering the losing party to pay costs to the other party.

As to the legal interest, Civil Procedure Rule 44.3 (32 L.P.R.A. App. III), insofar as it is pertinent, provides that:

(a) [Interest,] at the rate fixed by regulation by the Finance Board of the Office of the Commissioner of Financial Institutions in effect when judgment is pronounced, shall be included in every judgment ordering the payment of money, to be computed on the amount of the judgment from the date it was pronounced and until paid up, including costs and attorney's fees. The interest rate shall be stated in the judgment.

....

(b) Except when the defendant is the Commonwealth of Puerto Rico, its municipalities, agencies, instrumentalities or officers acting in their official capacity, the court will also *impose on the party that has acted rashly the payment of interest at the rate fixed by the Board by virtue of the previous subsection which is in effect at the moment the judgment is pronounced, from the time the cause of action arises in every case of collection of money and from the time the claim is filed in actions for damages until the date judgment is pronounced, to be computed on the amount of the judgment.* The interest rate shall be stated in the judgment. [Emphasis added.]

After determining that defendants-appellants were negligent and obstinate, and in view of the cited provision, the trial court acted correctly in ordering defendants to pay pre-judgment interest as of the filing date of the complaint.

The pediatrician, *Dr. Hidalgo*,⁷⁹ the anesthesiologists, *Dr. Frederick González*⁸⁰ and *Dr. Gloria Santaella*,⁸¹ the Hospital,⁸² the otorhinolaryngologist, *Dr. Ferdinand Menéndez*,⁸³ and the *Patient's Compensation Fund Administration*,⁸⁴ question *the amount of the compensation* awarded by the trial court to coplaintiffs for physical damage, mental anguish and suffering. Before going into the discussion of these errors, let us see the sums which the court ordered defendants to solidarily pay plaintiffs for physical damage, mental anguish and sufferings: \$500,000 to the minor Alicia Marie; 2) \$800,000 to Ivelisse Blás Toledo, the child's mother; 3) \$300,000 to Luis Santos Colón, the child's biological father; 4) \$50,000 to Edgardo Nieves Piñeiro, the child's stepfather; 5) \$25,000 to the Succession of Efraín Santos Rivera (composed of his sole and universal heir Luis Santos Colón, the child's biological father), for the sufferings and mental anguish suffered by the late Efraín Santos Rivera, Alicia Marie's grandfather; 6) \$25,000 to the Succession of Elba Toledo (composed of Ivonne Nieves Toledo and Ivelisse Haydée, Frankie Anthony and Francis Davis Blás

79 In his *seventh* assignment of error.

80 In his *sixth, ninth, tenth, eleventh, and thirteenth* assignments of error.

81 In her *fourth* and *seventh* assignments of error.

82 In its *fifth* and *sixth* assignments of error.

83 In his *fourth* assignment of error.

84 In its *first, second, and third* assignments of error.

Toledo), for the sufferings and mental anguish suffered by Elba Toledo, Alicia Marie's maternal grandmother.⁸⁵

As we have frequently stated, "the judicial endeavor of measuring damages is a difficult and distressing one, inasmuch as there is no mechanical system to reach an accurate result that would satisfy all the parties concerned." *Rodríguez Cancel v. A.E.E.*, 116 D.P.R. 443, 451 [16 P.R. Offic. Trans. 542, 551] (1985); *Urrutia v. A.A.A.*, 103 D.P.R. 643 [3 P.R. Offic. Trans. 896] (1975). With regard to this difficult and distressing task, we have recognized that, ordinarily, trial courts are in a better position than appellate courts to assess the situation, since trial courts come into direct contact with the evidence brought by the claimant. *Publio Díaz v. E.L.A.*, 106 D.P.R. 854 [6 P.R. Offic. Trans. 1173] (1978). Hence the judicial self-restraint rule: this Court shall not disturb the decision rendered by trial courts with regard to that matter, unless the amounts awarded are absurdly low or exaggeratedly high. *Valldejuli Rodríguez v. A.S.A.*, 99 P.R.R. 890 (1971); *Urrutia v. A.A.A.*, 103 D.P.R. 643 [3 P.R. Offic. Trans. 896]. Moreover, the party who comes before this Court to seek modification of the amounts awarded by the trial court must show that there are circumstances that warrant such modification. *Canales Velázquez v. Rosario Quiles*, 107 D.P.R. 757 [7 P.R. Offic. Trans. at 830] (1978); *Rodríguez Cancel v. A.E.E.*, 116 D.P.R. 443 [16 P.R. Offic. Trans. 542].

We wish to clarify first of all that we are well aware of the sufferings and mental anguish that the relatives of Alicia Marie have borne during the years following such tragic in-

⁸⁵ The compensation awarded to each Succession for mental anguish and suffering will be discussed later, in the last assignment of error made by several appellants.

cident. There is no doubt that plaintiffs-appellees must be *adequately compensated* for their sufferings. However, it is our opinion, in light of the aforementioned doctrine and after thoroughly analyzing the evidence, *that we should modify some of the amounts awarded because they are exaggeratedly high.* *Urrutia v. A.A.A.*, 103 D.P.R. 643 [3 P.R. Offic. Trans. 896].

The evidence presented by plaintiffs to prove the damages moved the trial court to determine that, as a question of fact, the following damages—that we upheld—had been established. It is an undisputed fact that after the hospital incident, Alicia Marie⁸⁶ was completely disabled and she entirely and absolutely depended on the care she received from her relatives—especially her mother—and that she needed specialized care and constant supervision all the time. She had to be fed five times a day, she needed physical therapy at least three times a day—moving and massaging her legs, arms and head—and she had to be turned over from time to time to prevent skin ulceration. Her nasal secretions and her saliva had to be constantly suctioned, and she had to be bathed daily and cleaned as often as necessary. Alicia Marie did not move, and neither could she hear, see, or speak; she did feel pain. The trial court witnessed this on two [videotapes] showing how every two days a nasogastric tube had to be introduced through her nose down to her stomach to administer the food necessary for her subsistence. According to the expert evidence presented, the child was in pain, even though she could not express her suffering. When she felt pain, she could not show it, but she cried, she moaned, and her body felt it. The court watched the [videotape] that showed how the

86 We summarized the evidence on the damages taking into account that when we wrote this opinion, Alicia Marie had already died.

girl spent her daily life, and determined that she did feel pain and physical sufferings. We shall not disturb that determination.

Her body's discomfort and her physical deterioration are actual damages. Appellants ask this Court to revoke the compensation awarded to the girl, alleging that since she was brain-dead, she could not understand and was unaware of her suffering. They allege that her damage is not compensable because she had the capacity of a newborn. They also argue that Alicia Marie's mental damage cannot be compensated because of her severe brain damage. Nothing can be further from the truth. It was proven to the satisfaction of this Court that Alicia Marie suffered and felt pain. However, in our opinion, the \$500,000 compensation awarded to her is "exaggeratedly high." *Rodríguez Cancel v. A.E.E.*, 116 D.P.R. 443 [16 P.R. Offic. Trans. 542]. *Therefore, we deem it proper to reduce said sum to \$250,000.*

As for the damage suffered by Ivelisse Blás Toledo, the trial court determined that she had suffered enormously when she saw how her daughter—who was two years and nine months old, and whom she loved dearly—was suddenly and unexpectedly left totally and permanently incapacitated, in a state of vegetation, without the least hope of recovery and with a life expectancy of 19 years at the time the judgment below was rendered. Ivelisse was deeply anguished and suffered constantly for her daughter's condition and future. She told the trial court that she still asks herself why Dr. Hidalgo and Dr. Menéndez subjected the girl to an operation that was contraindicated and unnecessary, and why to this date no one has been able to give her an explanation of what happened.

We understand the sufferings and the mental anguish suffered by Blás Toledo. However, it is our opinion that the \$800,000 compensation awarded for such items by the trial court is "exaggeratedly high," especially *in light of the decision in Riley v. Rodríguez de Pacheco*, 119 D.P.R. 762, 804-805 [19 P.R. Offic. Trans. 806, 848-850] (1987). In that

case, we stated the following with regard to the assessment of damages:

[U]pon awarding damages, we are aware that human sorrow and physical pain are not similar or financially assessable. Money and pain "are so different that they are not comparable. But if money does not suffice to redress this type of damage, an insufficient compensation for the victim would be better than none. Thus, although money cannot be compared with pain, the victim may be awarded a compensation which, although it would not restore the loss suffered, it would allow him to procure certain pleasures and physical or mental satisfactions to mitigate the pain." J. Ataz Lopez, *supra*, at 328. Third, when taken to the real extremes, mental suffering and bodily pain may be quantified ad infinitum. Without reasonable limits, compensation would no longer bear the characteristics of a redress, but would rather become punitive. *Rivera v. Rossi*, 64 P.R.R. 683 (1945). It bears noting that this "interpretation should not be regarded as an underestimation of the reality and honesty of [the] sufferings." *Pérez Cruz v. Hosp. La Concepcion*, *supra*, at 739. Fourth, when passing on medical malpractice cases, except in cases involving willful misconduct, we remember "that the healing hand does not reach the degree of social offense of the injuring hand." *Negrón v. Municipio de San Juan*, 107 D.P.R. 375, 381 (1978) (Justice Díaz Cruz, dissenting). Fifth, assessment of [damages is an intrinsically complex task. *Polanco v. Tribunal Superior*, 118 D.P.R. 350 (1987).

"Assessing] a fair and reasonable compensation for damages sustained, [is] a challenging task even for a modern King Solomon." 6 *Emotional Disability and Compensation, Traumatic Medicine & Surgery for the Attorney* 82, Washington, Ed. Butterworth, (1962). Human assessment of elements not visible but intangible (emotions such as pain, joy, sadness, frustration, peace, peace of mind, honor, and others) is not devoid of a certain degree of speculation. We try to reach a reasonably balanced award, that is, not extremely low nor disproportionately high. *Urrutia v. A.A.A.*, 103 D.P.R. 643, 647-648 (1975). And, finally, we must see that compensation for damages does not become a lucrative forensic industry where doctors and patients are the raw material. [Footnotes omitted.]

Considering all the factors involved, and after applying the above statements to the case at bar, we modify the amount awarded to Blás Toledo. *We deem reasonable the sum of \$400,000 for mental anguish.*

As for the mental anguish suffered by Luis Santos Colón, the girl's biological father, we believe that he, just like his ex-wife, suffered great anguish and pain upon seeing his daughter in such precarious condition after the incident at the Hospital. According to the evidence presented, Santos remained by ~~her~~ daughter's side during the time she was in the hospital. When she was discharged from the hospital, he went to see her every day and gave financial assistance and moral support to her mother and to the other relatives. He helped with his daughter's daily care whenever he could. However, considering that Santos did not live in the same home with Alicia Marie, and that he was not totally

and fully involved in his daughter's care and daily life, but recognizing his mental sufferings, we are of the opinion that the \$300,000 awarded to him is "exaggeratedly high." *We deem that the sum of \$200,000 is more in keeping with the reality of the damage suffered by this coplaintiff.*

As for Edgardo Nieves Piñero, Alicia Marie's stepfather, we are of the opinion that he suffered greatly when he saw the condition in which the girl—whom he loved as a daughter—was left after the incident and how she suffered daily because of her irreversible condition. Nieves had a very close relationship with the child, to the point that she called him *Papi Luis* ("Daddy Luis"). When the incident occurred, Nieves remained at the side of his wife Ivelisse at all times. Since he had some experience in hospital work, Nieves was the next of kin trained to care for, clean, and feed the girl during Ivelisse's pregnancy. After Ivelisse gave birth, she was trained by Nieves so that he could go back to his work. Together with his wife Ivelisse, Nieves Piñero was in charge of the daily care of the minor and he made sure that she received adequate attention in keeping with the medical orders. Nieves and Ivelisse divorced in 1985, but this did not keep him from helping Ivelisse with the therapies and treatments whenever she needed help. We deem that the compensation awarded to Edgardo Nieves Piñero, Alicia Marie's stepfather, is neither ridiculously low nor exaggeratedly high; thus, we shall not disturb the same. In keeping with the evidence presented in the trial court, *the \$50,000 compensation awarded by the trial court to Nieves is fully justified.*

The anesthesiologists, *Dr. Frederick González* and *Dr. Gloria Santaella*—in their assignments of error *eighth* and *tenth*, respectively—question the correctness of the \$30,000 compensation awarded to the minor for loss of future earning capacity. We must clarify, first of all, that special dam-

ages must be alleged in the complaint because, otherwise, they are waived. It is thus required by Rule 7.4 of Civil Procedure.⁸⁷ *Prado v. Quinones*, 78 P.R.R. 300; *Betances v. Transportation Authority*, 73 P.R.R. 215; *Tuya v. White Star Bus Line, Inc.*, 59 P.R.R. 784. The loss of future earnings is a special damage and, therefore, must be mentioned in the complaint in order to be subsequently recovered.⁸⁸ Plaintiffs met this requirement by establishing in pleading No. 60 of their complaint that the child Alicia Marie “will suffer loss of future earnings because she has entirely lost the capacity to develop as a person, to study, and to become a productive human being”

In *Ruiz Santiago v. E.L.A.*, 116 D.P.R. 306, 31[1] [16 P.R. Offic. Trans. 376, 382] (1985), we recognized, for the first time, the modality of loss of earnings that we called “impairment of the general earning potential.” This modality refers to a person who had never received earnings and was not receiving any at the time of the wrongful act. Such is the case when incapacity is caused to a minor who had never received earnings, but who is favored by the presumption that he would have been a normal person and would have earned as much as such person would have earned⁸⁹ “Compensation is not aimed at substituting [for] income—because there is none—but at indemnifying through a lump sum, the impaired earning potential vis-à-vis the reality of said damage.” *Id.* at 317 [16 P.R. Offic. Trans. at 389-390].

87 Rule 7.4 of Civil Procedure, 32 L.P.R.A. App. III, requires that “[w]hen special damages are claimed, the nature of the different items shall be specifically stated.”

88 See also, H. Brau del Toro, *Los daños y perjuicios extracontractuales* 433, San Juan, Pubs. J.T.S. (1986).

89 See *id.*

In the leading case *Pate v. U.S.A.*, 120 D.P.R. 566, 572 [20 P.R. Offic. Trans. 591, 596-597] (1988), we reaffirmed the *Ruiz Santiago* ruling and summarized the doctrine as follows:

In that case we said that the complications inherent to the assessment of an adequate compensation in such circumstances could not be the stumbling block in our main function of doing full justice. After all, "even in the case of a minor, his earning potential as a human being has been destroyed." [*Ruiz Santiago v. E.L.A.*] at 314. We stated further that this type of damage "is an injury that can be identified with marked probability." *Id.* at 317. In order to devise the remedy, we listed several factors that should be taken into consideration when fixing the amount. To that effect, in "this judicial function of assessing damages, absent a prior history of gainful activity, we must take into account the status of the minor at the time of his disability and its reasonable future projection. The following are the appropriate factors: type of family nucleus, degree of household stability, age, prior physical and mental health condition, intelligence, disposition, education, study habits, skills in school, talent, specific interests, 'hobbies and skills developed, degree of maturity and experience.'"

Under the above doctrine, in this case, Alicia Marie had the right to seek compensation for such impairment, inasmuch as defendants' actions deprived her of her future earning capacity by leaving her permanently disabled. The evidence presented at the trial—in particular the testi-

mony of the girl's parents—showed that she had expectations of becoming a productive person. Moreover, in keeping with our pronouncements in *Ruiz Santiago*, 116 D.P.R. at 311 [16 P.R. Offic. Trans. at 383], Alicia Marie, just like all other children, “has in [her] favor every presumption that [she] will be a normal person able to earn what such a person would earn.” [Emphasis omitted.]

The judgment rendered by the trial judge clearly indicates that she took into consideration the above-mentioned factors and that, based on the same, she arrived at her decision to award \$30,000 to Alicia Marie for the loss of her earning capacity. We deem that said sum is fair and adequate, and correctly reflects the loss of Alicia Marie's earning capacity. *Therefore, we shall not disturb said award.* The error was not committed.

In its eighth assignment of error, the *Patient's Compensation Fund Administration*⁹⁰ (hereinafter the AFCP, by its

90 The Patient's Compensation Fund Administration was created by Act No. 74 of May 30, 1976, known as the Medico-Hospital Professional Liability Act, 26 L.P.R.A. § 4101 *et seq.* It was adopted by the Legislature to provide a basic coverage for medico-hospital professional liability to cover that part of each claim for damages for malpractice in the care and treatment of patients in Puerto Rico exceeding the limits of financial liability required of health care professionals and health care institutions (26 L.P.R.A. § 4105(1)(a)). See *Sánchez Millet v. E.L.A.*, 118 D.P.R. 106, 110 [18 P.R. Offic. Trans. 129, 133-134]. (1986).

The Insurance Code and, consequently, the Joint Underwriting Association and the Patient's Compensation Fund Administration, were abolished by subsec. 3 of sec. 41.070 of Act No. 4 of De-

Spanish acronym), questions the correctness of the decision of the trial court holding the AFCP—which allegedly is part of the State—solidarily liable in the judgment when, according to the policy in force, the AFCP is solely liable for a maximum of \$75,000, and is exempted from the payment of interest and attorney's fees.

The AFCP issued a medical professional liability insurance policy (Policy No. AFCP 1401) to Dr. Gloria Santaella as insured. Said policy was in force when the negligent acts in question occurred, since the policy covered the period from October 15, 1981, to June 30, 1982.⁹¹ The

[Footnote continued from previous page]

cember 30, 1986. Insofar as it is pertinent, it provided the following:

“Every procedure which is pending before the Patient's Compensation Fund Administration or before any agency or court on the date of approval of this act [December 30, 1986,] which was initiated according to the provisions of Chapter 41 of Act No. 77 of June 19, 1959, as amended, which is repealed in Section 2 of this act shall continue to be transacted by the Insurance Commissioner *until a final decision is rendered pursuant to the laws and regulations in force on the date such procedures were filed or initiated.* To these effects, the Insurance Commissioner shall have all the powers, faculties and prerogatives enjoyed by the Patient's Compensation Fund Administration.” [Emphasis added.]

In view of the above, we resolve this assignment of error in keeping with the AFCP provisions in force on the filing date of this complaint.

91 The events of the case under our consideration occurred on November 16, 1981.

liability limits established in the policy were \$75,000 for each claim and an aggregate of \$150,000.⁹² The AFCP agreed in the policy to pay on behalf of the insured "such amounts as the insured is legally obliged to pay *as a result of any damage caused during the term of the policy to a patient by error, omission, fault, or negligence, resulting from the professional services rendered or that should have been rendered by the insured. . . .*" The AFCP, in turn, agrees to pay all the costs imposed on the insured in the course of a litigation defended by the AFCP. Under the paragraph "Limit of Liability of the AFCP," it is clarified that "[d]espite the number of claims or actions initiated *as a result of a damage caused, the AFCP shall be solely liable up to the amount specified in the paragraph of the Section Limits of Liability of the statements.*" (Emphasis added.)

After an analysis of the policy in question,⁹³ we understand that it is clear as to its provisions and that it meets the Insurance Code requirements regarding the medicohospital professional liability insurance (26 L.P.R.A. § 4101 *et seq.*). Under the policy provisions, and in keeping with the AFCP's agreement to pay if a negligent act is com-

92 These limits of liability are in keeping with the maximum limits established in Sec. 41.050 of the Insurance Code, as amended, in force on the policy issuance date. Said section provided that "[i]n no case shall the [Patient's Compensation Fund] Administration be liable for any amount in excess of seventy-five thousand (75,000) dollars per claim, and one hundred and fifty thousand (150,000) dollars, incremented. . . ." (See sec. 41.050 of Act No. 55 of July 18, 1978; *Ramos v. Hosp. Sub-Regional de Aguadilla*, 111 D.P.R. 744, 747 [11 P.R. Offic. Trans. 940, 944] (1981).

93 The insurance policy was presented by the AFCP and admitted by the trial court as Exhibit 1.

mitted by the insured, we deem that the AFCP was liable for Dr. Santaella's negligent actions in the instant case, but only up to the stipulated limit of \$75,000.

With regard to the payment of interest on the judgment, sec. 41.070(5) of ch. 41 of the Insurance Code (Act No. 74 of May 30, 1976),⁹⁴ provides that "[t]he [Patient's Compensation Fund] Administration shall not be subject to the payment of interest on the judgments affecting it." In view of this clear legal provision, we are of the opinion that the AFCP does not have to pay prejudgment interest. Therefore, the trial court *erred* in this respect by ordering the AFCP to pay said interest together with the other defendants.

In his fourth assignment of error, the anesthesiologist, Dr. Frederick González, questions the trial court's determination of causal relation between his negligence and the damage suffered by plaintiffs. As we mentioned above, for a damage action to prevail under sec. 1802, three requirements must concur: 1) the damage; 2) the negligent or wrongful act or omission; and 3) the *causal relation between the damage and the mentioned negligent or wrongful act or omission*. *J.A.D.M. v. Centro Com. Plaza Carolina*, 132 D.P.R. 785 [32 P.R. Offic. Trans. ____]; *Hernández v. Feurnier*,⁹⁵ 80 P.R.R. 94.

94 The above act was in force at the time of the events involved in the present case, and when judgment was rendered.

95 See *Rodríguez Crespo v. Hernández*, 121 D.P.R. 639 [21 P.R. Offic. Trans. 637]; *Ríos Ruiz v. Mark*, 119 D.P.R. 816 [19 P.R. Offic. Trans. 862] (1987); *Cruz v. Medico de P.R.*, 113 D.P.R. 719 [13 P.R. Offic. Trans. 931] (1983); *Zambrana v. Hospital Santo Asilo de Damas*, 109 D.P.R. 517 [9 P.R. Offic. Trans. 687] (1980).

As for Dr. González, it is proper to invoke, from the outset, the vicarious liability doctrine established in sec. 1803 of our Civil Code, 31 L.P.R.A. § 514[2], which provides that the liability imposed by sec. 1802 extends not only to a person's own acts or omissions, but also to the acts or omissions of those for whom said person should be responsible, that is, company owners are liable for their employees on account of their duties, among others. *Vélez Colón v. Iglesia Catolico*, 105 D.P.R. 123 [5 P.R. Offic. Trans. 164] (1976).

In the Findings of Fact of the case at bar, the trial court concluded that Dr. González was Dr. Santaella's employer when the incident occurred.⁹⁶ After analyzing the evidence, we are of the opinion that there is no prejudice, passion or partiality (bias) in said finding; thus, we shall not disturb the same. Therefore, considering—as it was previously established—that Dr. Santaella was negligent, Dr. González is *vicariously* liable for her acts.

On the other hand, with regard to Dr. González's *own actions*, as head of the Hospital's Department of Anesthesiology under an exclusive contract, he knew, or should have known that the intensive care unit was not adequately equipped to handle an emergency occurring during the administration of an anesthetic. Neither was there the necessary equipment to monitor children who were in Alicia Marie's condition. Since Dr. González was the head of said department, he knew or should have known that it was not the first time that an incident similar to that involving Alicia Marie had occurred at the Hospital. We must not forget that Dr. Santaella had told Dr. González on several occasions that the operating room needed emergency equipment for children. In light of this reality, it was foreseeable that if an incident

96 See Finding of Fact No. 66 of the trial court judgment at 77.

involving a child occurred in the operating room, adequate care could not be provided, and this would aggravate the damage.

The anesthesiologists, *Dr. Santaella* and *Dr. González*, the *Hospital*,⁹⁷ and the *Patient's Compensation Fund Administration*,⁹⁸ question the validity of the compensation for mental anguish and sufferings awarded by the trial court to the Successions of Alicia Marie's grandparents Efraín Santos Rivera and Elba Toledo, who died before the trial was held and could not testify about such damages. We do not agree. In *Vda. de Delgado v. Boston Ins. Co.*, 101 D.P.R. 598 [1 P.R. Offic. Trans. 823] (1973), we recognized that the right to claim [compensation] for physical and moral sufferings is a patrimonial property transmitted to the heirs upon the death of the predecessor. On the other hand, in *Consejo de Titulares v. C.R.U.V.*, 132 D.P.R. 707 [32 P.R. Offic. Trans. ____] (1993), we repeated several pronouncements made in the above case. To such effect, and citing *Vda. de Delgado* at 605-606 [1 P.R. Offic. Trans. at 832-833], we stated that:

The principle and practice of turning the human pain and suffering originated by a negligent act into the proper pecuniary compensation, having taken naturalization papers in our civil law, *the right to claim it was given a patrimonial character*, and since that right or cause of action represents a patrimony which can be valorized in money with appraisal or valuation standards which have gained the ethical approval of the contemporaneous soci-

97 In their *sixth*, *fifth*, and *seventh* assignments of error, respectively.

98 In its *fourth* and *fifth* assignments of error.

ety, *there is no legal or moral reason to exclude it from the hereditary estate transmitted by the predecessor to his heirs.*

After these pronouncements, we concluded in *Consejo de Titulares* "that the decedent's right to redress for the injuries suffered is a right that may be transferred to the heirs, 'because it is a perfectly assignable credit under the rules governing the transferability of rights.'" (Emphasis omitted.) According to the evidence presented by plaintiffs (TE 18-21/12/87, at 58-60), Alicia Marie's grandparents, who died during the litigation and before the trial, suffered great anguish upon seeing their little granddaughter's condition after the incident. The grandparents also suffered as members of Alicia Marie's family, and the evidence showed not only that they saw her in said condition, but also that they suffered great mental anguish when they saw their children struggling to keep their daughter alive and to find a remedy for her condition. They subsequently contributed to the care and support of Alicia Marie through their work and economic help.

Although the deceased grandparents did not testify about their anguish and sufferings, we are of the opinion that their heirs proved—with *indirect evidence, through their own testimony to such effect*—that their predecessors indeed suffered the pain and the sufferings caused by appellants to their family in general. Therefore, they proved that the compensations awarded were indeed proper.⁹⁹

99 Insofar as it is pertinent, in *Moa v. Commonwealth*, 100 P.R.R. 572, 585 (1972), we concluded that:

"[S]ince pain and suffering cannot be object of quotation, to determine the reasonable value of such moral damages *it is necessary that the claimant, in each case, bring the necessary factors of evidence to evaluate them fairly and adequately,*

[Footnote continued on next page]

In light of the mentioned caselaw on the transmissibility to the heirs of the right to recover for their decedent's sufferings and mental anguish, we hold that the trial court acted correctly in awarding compensation to each of the Successions of Alicia Marie's deceased grandparents. The trial court determined that the sum of \$25,000 was reasonable; we will not disturb said amount, inasmuch as it is supported by evidence.

For the foregoing reasons, the judgment rendered by the Superior Court, San Juan Part, is *modified* for the purposes mentioned above; and, thus modified, it is affirmed. The case is remanded to said court for further proceedings consistent with this opinion.

Judgment will be rendered accordingly.

Justice Naveira de Rodón concurs in part and dissents in part; she concurs because she believes that the finding of negligence is correct, and dissents because she would not modify the amounts awarded by the trial court, which she deems reasonable. Justice Hernández Denton would affirm the totality of the judgment sought to be reviewed, inasmuch as he would not modify the amounts awarded by the trial court. Justice Negrón García disqualified himself.

[Footnote continued from previous page]

showing that it is not a question of a simple passing affliction, but that, *in some appreciable measure the health, welfare, and happiness of the claimant were really affected*, as we said in *Ramos Rivera v. Commonwealth*, 90 P.R.R. 806, 809 (1964). (Emphasis added.)

IN THE SUPREME COURT OF PUERTO RICO

Ivelisse Blás Toledo *et al.*

Plaintiffs and appellees

v.

No. RE-89-40

Hospital Neustra Señora de la
Guadalupe; the Medical Staff of
Hospital Neustra Señora de la
Guadalupe; Dr. Gloria Santella,
Universal Insurance Company,
and the Patient's Compensation
Fund Administration

Defendants and appellants
the last three

Ivelisse Blás Toledo *et al.*

Plaintiffs and appellees

v.

No. RL 39-43

Hospital Neustra Señora de la
Guadalupe *et al.*,

Defendants

Dr. José R. Hidalgo and Insurance
Company of North America,

Defendants and appellants

Review

Ivelisse Blás Toledo *et al.*

Plaintiffs and appellees

v.

No. RE-89-44

Hospital Neustra Señora de la
Guadalupe and Corporacion Insu-
lar de Seguros,

Defendants and appellants

Ivelisse Blás Toledo *et al.*

Plaintiffs and appellees

v.

No. RE-89-45

Hospital de la Guadalupe, Dr. Fer-
dinand Menéndez *et al.*,

Defendants and appellant
the second

Ivelisse Blás Toledo *et al.*

Plaintiffs and appellees

v.

No. RE-89-48

Hospital Neustra Señora de la
Guadalupe, Dr. Frederick A. Gon-
zález, Gloria Tancin de González,
the Conjugal Partnership consti-
tuted by the latter two, Anesthesia
Service III, Respiratory Care of
Puerto Rico, Inc., Gloria Ayala,
Maria Leguillow *et al.*,

Defendants and appellants

JUDGMENT

San Juan, Puerto Rico, June 30, 1998

On the grounds set forth in the foregoing Opinion, which is made an integral part of these presents, Judgment is rendered to modify—for the purposes indicated in the Opinion—the judgment rendered by the Superior Court of Puerto Rico, San Juan Part; and thus modified, it is affirmed.

It was so decreed and ordered by the Court and certified by the Clerk of the Supreme Court. Justice Naveira de Rodón concurs in part and dissents in part; she concurs because she believes that the finding of negligence is correct, and dissents because she would not modify the amounts awarded by the trial court, which she deems reasonable. Justice Hernández Denton would affirm the totality of the judgment sought to be reviewed, inasmuch as he would not modify the amounts awarded by the trial court. Justice Negrón García disqualified himself.

Isabel Llompart Zeno
Clerk of the Supreme Court

APPENDIX F

IN THE SUPREME COURT OF PUERTO RICO

Sharon Riley, individually
and in behalf of her daughter
Sylvia Pérez Riley,

Plaintiff and appellee

v.

Nos. R-84-107, Review
R-84-110

Dr. Edith Rodríguez de
Pacheco
et al.,

Defendants and
appellants

JUSTICE NEGRON GARCIA delivered the opinion of the
Court.

San Juan, Puerto Rico, December 2, 1987

“Law is that dream that constantly tempts the heart of men. It is the dream of a higher justice that exerts a powerful and constant influence over us.” 1 M. Iglesias Corral, *El enigma del derecho, libro homenaje a Ramón Roca Sastre* 72, Madrid, Gráficas Condor (1976). To make this dream come true, the ideal conduct that the courts should look for “when dealing with a professional activity, such as that of a physician, [is] the objective standard of the ‘good father of a family,’ embodied in the Code [which] in turn, becomes the

standard of the 'good professional' or 'good medical practitioner.' Such transformation does not presuppose in any case a 'specialty' of the standard used to measure the diligence required in a professional activity, but is rather a *concretion of the generic standard* embodied in sec. 1.104 [our sec. 1057] of the Civil Code; which is nothing more than the *necessary adaptation* of the rules to the circumstances in which they will be applied." J. Ataz López, *Los médicos y la responsabilidad civil* 239-240, Madrid, Ed. Montecorvo (1983). A clarification is in order here. Insofar as a good medical practice is concerned, in passing upon this case we are not establishing an absolute rule or imposing a stringent standard on obstetricians and gynecologists. We acknowledge that in the discharge of their duties and responsibilities physicians have an ample sphere in which to apply their informed opinion, in the light of the clinical picture before them at the time they take a decision with a future projection. We are simply deciding that, in 1975—in this particular case and in the way that the facts occurred—the physicians failed to act with the required diligence.

On May 4, 1976, Sharon Riley, individually and on behalf of her only daughter Sylvia Pérez Riley, filed a complaint seeking damages before the Superior Court, San Juan Part. She alleged that the defendants, gynecologist-obstetrician Dr. Edith Rodríguez de Pacheco, anesthesiologist Dr. Celso Víctor Zeni, and Hospital Pavia incurred concurrent negligent malpractice when she was giving birth to her child. The girl suffers from *anoxic encephalopathy*.¹ Defen-

1 This terminology describes "a brain damage that may be diffuse or massive, that is, whose extent may vary fundamentally and where there is an oxygenation failure in the baby's brain some time during childbirth." (March 18, 1981, Tr. Ev. p. 173.)

dants timely answered the complaint and denied liability. Dr. Rodríguez de Pacheco counterclaimed alleging that complain-tiff Sharon Riley had launched a campaign to damage her professional reputation. The counterclaim was dismissed.

The hearing on the merits lasted several days. Abundant oral and documentary evidence was presented. The court handed down a long and well-documented judgment² dismissing the action against Hospital Pavia and the counter-claim, but finding against Dr. Rodríguez de Pacheco and Dr. Zeni. It ordered them to pay \$100,000 to Sharon Riley for mental sufferings; \$30,000 for loss of earnings and \$8,352.90 for medical expenses incurred in Sylvia's treatment. With regard to Sylvia, the court ordered the defendants to pay \$500,000 for bodily injuries and \$300,000 for past and future moral damages. Attorney's fees were assessed at \$50,000 plus interest from the filing of the complaint. Dr. Zeni's in-

[Footnote continued from previous page]

Encephalopathy - "A disease of the brain, especially a chronic degenerative disease. A degenerative disease is one in which the affected tissue deteriorates." II J.E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder*, E-64, New York, Matthew Bender (1986).

Anoxic - "Marked by anoxia, the abnormal condition in which the oxygen content of the cells and the tissues of the body is below normal; having less than the normal amount of oxygen in the cells or tissues of the body; marked by a lack of oxygen, anywhere." *Id.* at I, A-239.

2 As per the parties agreement, the court's advisor on the issue of negligence was Dr. Stanley Asencio.

surer, Puerto Rican American Ins. Co., covered liability up to \$200,000. At the defendants' request, we agreed to review.³

I

The facts in this case took place during Mrs. Riley's childbirth. She was a patient under Dr. Rodríguez de Pacheco's care as of December 3, 1973. Mrs. Riley chose the psychoprophylactic method, that is, drug-free childbirth. She was primipara.

3 They filed separate appeals, which we have consolidated for obvious procedural reasons. The errors assigned may rightfully be classified into four groups: 1) statute of limitations; 2) negligence (malpractice); 3) damages and compensation; and 4) other issues.

Dr. Edith Rodríguez pointed out that the Superior Court erred: (1) in making a negligence finding without establishing a causal connection between her actions and the injuries sustained by the child; (2) in applying the medical professional liability standard; (3) in finding that coplaintiff Riley's action was not time-barred; (4) in awarding excessive and arbitrary damages not grounded on the evidence, and without establishing a causal nexus; (5) in giving credit to Dr. Juan José Hernández Cibes's testimony, which testimony was full of mistakes and tainted with bias, prejudice, and interest; (6) in not giving credit to the testimonies of Dr. Fernández Plá, Dr. Edith Rodríguez de Pacheco, Dr. Celso Victor Zeni, and Mrs. Berta Godoy; (7) in awarding special damages not proved; (8) in refusing to hold a new trial; and (9) in failing to make some amendments and additional findings under Civil Procedure Rule 43.3 (32 L.P.R.A. App. III), and not granting a reconsideration.

Dr. Zeni argued that the trial court erred in concluding that he had incurred negligence; in not finding that Sharon Riley's cause of action was time-barred; and in awarding excessive damages and attorney's fees.

Mrs. Riley's prenatal medical record prepared by Dr. Rodríguez de Pacheco is deficient. It lacks fundamental information on her family history, the pregnancy, and follow-up. There is no record of her menstrual period, her temperature, pulse, breathing, station, dilation, effacement, hemoglobin, sugar, and acetone. The only tests included in the medical record are the blood tests that are within the normal limits. There is no indication of the position of the fetus, which data must be recorded for every month of the pregnancy. Fetal heartbeats are reported although frequency is not mentioned. The size of the uterus was recorded on the first three visits, but not afterwards. The urine albumin ratio is negative during the last seven follow-up visits. There is no indication that Riley was subjected to an internal pelvic examination or pelvimetry—an X-ray examination of the pelvic measurements—to determine the size of the pelvis before childbirth.

On May 18, 1974, at 4:55 a.m., Riley was admitted to Hospital Pavia. According to the admission medical record, she was primipara; she had had no previous childbirths or abortions. The tentative date set for the childbirth was May 11, 1974. She was admitted by orders and under the service of Dr. Rodríguez de Pacheco. In the admission examination the "ears, nose, and throat are negative, lungs are clear, heart is normal without murmurs, the abdomen shows a pregnancy tumor, with a height of three fingers from the fundus, negative limbs, negative skin, weight gained during pregnancy, 8 pounds." Exhibit 1, at 7. There was, no evidence of toxemia or blood abnormalities. In the opinion of Dr. Rodríguez de Pacheco, there was no pelvic disproportion. At 5:45 a.m., following Dr. Rodríguez de Pacheco's orders, she was administered 1,000 cc of glucose in water, intravenously. At 7:00 a.m., she was administered 5 units of "Syntocinon" (synthetic pitocin) to stimulate contractions through the liquid of the glucose. A nurse recorded 140 fetal heartbeats per minute. At that same hour, Dr. Rodríguez de Pacheco rup-

tured her membranes. There is no indication in the record as to why this was done. At 9:30 a.m., she was slowly administered 5 mg of "Valium" intravenously. At 12:00 noon, the nurse recorded that fetal heartbeats were okay (156 per minute). At 2:00 p.m., the childbirth was active enough. The patient had contractions every 2 minutes.

The Delivery Room notes contained no record of a pelvimetry or of the fetal age. The blanks for the results of the type and compatibility test *had not been filled*.⁴

4 There are notes as to the fact that contractions occurred every 10 minutes with a duration of 5 seconds, a dilation of 1 to 2 cm and a 1(-1) station. The following information appears on the fetal heartrate frequency column, "the word 'OK' was entered at 7:00 a.m. and *no further fetal heartbeats were reported for the rest of the delivery.*" Exhibit 1, at 7. *Nothing* was entered in the blood pressure column. *No blood pressure was recorded during the labor.* In the space where the contractions and type of childbirth are supposed to be recorded, there are notes only for 7:00 and 8:00 a.m., every 5 minutes. There are no notes as to the duration of the contractions. No notes were taken *after 8:00 a.m.*

In the column for *dilation and effacement* the following is reported: 7:00 a.m., 5% and 2 cm; at 8:00 a.m., 3 to 4 cm; at 9:00 a.m., 4 cm; at 10:00 a.m., 5 to 6 cm; at 12:00 M., 7 to 8 cm; at 1:00 p.m., 7 to 8 cm; at 2:00 p.m., 8 to 8 1/2 cm; at 2:50 p.m., "anterior lip"; and at 3:20 p.m., "fully dilated." As to the stages of labor, the record contains the following: at 7:00 a.m. (-1) minus one; at 8:00 a.m., nothing; at 9:00 a.m. (-0) to (-1); at 10:00 a.m. (-0) to (-1); at 11:00 a.m., 12:00 M., and 1:00 p.m., the same; at 2:00 p.m. (-0); at 2:50 p.m. (0+1); and at 3:20 p.m. (+1).

In the presentation and position of the baby, the notes for 7:00 and 8:00 a.m. state "vertex."

Finally, at 3:30 p.m., patient Riley was transferred to the Delivery Room. Local anesthesia was administered and Sylvia was born at 4:12 p.m. in "left occipitoposterior" position, that is, with the head inclined toward the left side of the pelvis. She weighed eight and a half (8 1/2) pounds. She breathed with difficulty. She was given an Apgar Score of 6—without specifying the minutes—which indicated that her condition was delicate. This score differs from the report of the nurse who evaluated the Apgar at 15 minutes. Dr. Rodríguez de Pacheco used Simpson's mid-forceps. The placenta was delivered spontaneously and complete at 4:17 p.m.

When the baby was born, she did not cry. She breathed with difficulty. She had abundant and thick secretions. They cut the umbilical cord. She was also given the Crede treatment, that is, instillation of silver nitrate drops into her eyes. Because the delivery was supposed to be a psychoprophylactic one there was no anesthesiologist present in the delivery room at the time. In these circumstances, Dr. Rodríguez de Pacheco did not deem it necessary. Neither did she tell Mrs. Riley beforehand.

Dr. Rodríguez de Pacheco and the obstetric nurse began the emergency treatment. The nurse applied oxygen. With Dr. Rodríguez de Pacheco's consent, the nurse placed an urgent call to the anesthesiologist, Dr. Zeni. He was in the Surgery Room and came right away. He found the baby in a respiratory depression and in a moderate cyanotic state. As a resuscitation treatment, he applied the laryngoscope, suctioned the secretions, and applied a small oxygen mask to inflate the lungs. He did not intubate the child to extract meconium. The process took less than one minute and temporarily relieved the baby who began to breathe normally. Dr. Zeni observed her briefly until he made sure that breathing was normal, then, he decided to leave. During his intervention, there was an incident, to which we shall refer later, with

Cristino Pérez Febo, the baby's father. Shortly afterwards, the child again began to breathe with difficulty. A pediatrician answered the emergency call. He went up to the Delivery Room and found the baby in respiratory distress; the baby had retractions, a grunt and was slightly cyanotic. These are characteristics of neonatal asphyxia. His note in the medical record shows that she was administered oxygen. This pediatrician transferred the baby to the Nursery and gave the *acutely ill* baby to Dr. Rodríguez Rodríguez for management.

According to the baby's record, the mother had not had any complications during the pregnancy. It was a term pregnancy. The expected delivery date was May 11, 1974. There are no entries as to the duration of the active delivery. According to the notes, the membranes were artificially ruptured and the baby's presentation and position was left occiput posterior (l.o.p.).

According to the evidence and to the trial court, baby Sylvia suffered cerebral anoxia during the delivery. As a result of this, the baby suffered apnea, was cyanotic, and in poor general conditions. She required resuscitation. Although later on she managed to breathe for a while, her breathing became labored again and she turned cyanotic. Five or six hours after her birth, Sylvia developed chronic convulsions and cyanosis. The convulsions continued during the next days. As a result of this the cranial sutures separated beyond normal because of brain swelling. She suffered brain edema.

The medical orders for the baby's admission on May 18 required that the baby be placed in an incubator with a temperature of 36°C and, if necessary, that she be administered oxygen in a concentration of 40%; that she be placed under observation in case she had a respiratory problem; that chest X-rays be made; and that certain antibiotics be administered. The chest X-ray revealed the following: "the lung fields are

negative, the heart is of normal size, and the pulmonary circulation is not remarkable." On May 19, Sylvia had three seizures before 3:45 p.m. They were described as follows: "[She was] cyanotic, stiff, and jerking the extremities." During the visit she had another convulsion. The physician ordered a blood sugar test using a dextrostix which showed she suffered from hypoglycemia. At 5:00 p.m. that same day she had another seizure. A lumbar puncture was unsuccessfully tried. Later, at 9:25 p.m., a note was entered indicating that the seizures had continued.

On May 20, 1974, at 9:00 p.m., Sylvia had a seizure described by neurologist Dr. Eduardo Yarabal Font as follows: "She turns eyes to the left, lifts her arm, becomes apneic, and develops bradycardia. This seizure lasted one minute and a half." According to the trial court and the evidence the baby had multifocal convulsions on several occasions related to the brain edema and hypoglycemia. The brain edema and hypoglycemia were directly caused by the cerebral anoxia suffered during delivery, aggravated by the lack of timely treatment which culminated in an anoxic encephalopathy. The record indicates that on May 21, 1974, the girl had three more seizures between 7:00 a.m. and 3:00 p.m. As of May 22, she began to show continued improvement and the seizures stopped. She was discharged on May 31.

With this background in mind, let us pass on the assignments of error as we grouped them above.

II

Limitation of Actions

Both Dr. Rodríguez de Pacheco and Dr. Zeni insist that Riley's action is time-barred. The learned trial court held otherwise. The error was not committed. The uncontroverted evidence showed that in view of the baby's symptoms, the mother continued to seek the advice of Dr. Mirabal Font. It was not until September, 1975, that Riley learned that Syl-

via's condition was caused by brain damage suffered during childbirth. Dr. Mirabal Font informed her this fact on this date when, after conducting a series of tests, he assured himself of this conclusion. It was thus testified by this renowned physician. Before this, Riley only knew about the condition.

In these circumstances, the doctrine laid down in *Colon Prieto v. Geigel*, 115 D.P.R. 232, 246-247 (1984),—that the period begins to run as of that knowledge—is applicable to this case. “The position mentioned is the fairest and most equitable. We safeguard the aggrieved party’s right to seek redress, while we abstain from rewarding the person who, having caused the damage, took refuge in his patient’s trust and ignorance trying to avail himself of the circumstances in order to defeat the action. ‘Apart from that, in order to exercise the action, *not only must the aggrieved person know that he has been injured; he must also know who is the author of the injury in order to address the action against him, so he may know who to sue*; reason why, the statute of limitations is triggered off by the notice of the injury, plus notice of the person who caused it.’ (Underscore supplied.) 1 A. Borrell y Soler, *Derecho Civil Español* 500, Barcelona, Ed. Bosch (1955). See: M. J. Argafiarls, *La Prescripción Extintiva* 245, Buenos Aires, Ed. Tea (1966); 11-2 L. Enneccerus, *Tratado de Derecho Civil* 1163, Barcelona, Ed. Bosch (1966).”

In its resolution of September 26, 1978, the trial court weighed the documentary evidence and the testimony of Dr. Mirabal Font and ruled that “in this particular case, the plaintiff learned about the damage in September, 1975, when Dr. Mirabal Font informed the plaintiff about it.” We shall not disturb the conclusion of the lower court. It is amply supported by the evidence brought on the limitation of action issue. We have not been shown that there are extraordinary circumstances or indication of passion, prejudice, bias or manifest error to justify our intervention. *Sánchez Rodríguez*

v. *López Jiménez*, 116 D.P.R. 172 (1985); *Pérez Cruz v. Hosp. La Concepción*, 115 D.P.R. 721 (1984).

III

Negligence

Likewise, the evidence solidly supports the conclusion regarding the negligence issue. Let us explore it in detail.

First, the *Prenatal Record* and the *Labor Report* are not properly filled in. Both omit essential and important information. What is the consequence of this omission? To such end, the expert testimony of Dr. Juan J. Hernández Cibes stated:⁵

I believe that the exercise of clinical judgment on cases and especially the clinical judgment that had to be exercised in this specific case in view of the framework of facts as these occurred and as these could have been

5 Explaining the importance of the pelvimetry, this expert stated: "Riley testified here that an instrument that looked like a pair of ice clamps had been applied to her; one end was applied to one side of her hips and the other one to the other side of her hips, and she was told that these were the measurements and that she should not gain too much weight. If those were the only measurements taken, then we're talking about the measurements taken at the times of Queen Victoria, with an instrument that measured what is called the Baudelocque's external conjugate, which is used to make certain calculations in order to draw other conclusions. This is not the examination performed today in the practice of obstetrics for clinically measuring the pelvis." (March 17, 1981, Tr. Ev. p. 98.) See, Hellman & Pritchard, *Obstetrics* 302-321, New York, Prentice Hall (4th ed. 1971).

eventually prognosticated, the clinical judgment could not be exercised because it was totally devoid of basic and essential information necessary for exercising clinical judgment. That is, one cannot exercise clinical judgment in vacuo, it is exercised with certain facts on hand. Obviously, the facts in this case are conspicuous by their absence; there is no pelvimetry, no adequate history, no prenatal record anticipating a possibility of problems with this patient, no clinical measurement of the size of the pelvis to know how it used to be and how it has changed now. No history was recorded upon the patient's admission, that could actually be used for wisely exercising clinical judgment; nobody took advantage of the fact that the patient was hospitalized again for taking of the X-ray measurements; the membranes were artificially ruptured without any reason, and this is something usually entered in the record; look, the membranes were ruptured for such and such a reason at such and such a time. Likewise, there is no reasonable explanation why a patient that apparently had been performing well up to that moment is administered pitocin; no entry was made to explain why this measure was taken. There is no specific knowledge that this patient had a contracted pelvis, and that it is contracted at the specific plane that could prevent normal rotation of a normal cephalic delivery. In my opinion a clinical judgment thus exercised, without even taking the minimum precautions for obtaining the necessary data to carry it through; a clinical judgment presumably exercised according to the testi-

mony of the husband who was there at the Delivery Room, although testimony to the contrary exists, while the obstetrician was absent from the Delivery Room for a number of hours during the delivery; a clinical judgment really based on four fetal heartbeats because one was taken upon admission, which four fetal heartbeats are taken by nurses who may be experts listening to and counting fetal heartbeats but not necessarily in this specific case; in the circumstances of this case, they did not necessarily show that they were skilled enough to interpret and anticipate the possibility of the problem that eventually cropped up, as was the sudden anoxia, the passing of meconium and other factors we have already discussed, without consulting the application of forceps, and subsequent events that are also related to other physicians who took part in the case. Look, that is not a well-founded clinical judgment; this is a clinical judgment exercised almost mechanically; there were no supporting facts." (April 7, 1981, Tr. Ev. pp. 135-137.)

The negligence incurred during the *prenatal* period may be summed up as follows: failure to order certain tests and failure to comply with the duty of properly completing the required record at each stage of the process. This did not allow for future comparative analyses and diagnoses. Of particular importance is the absence of x-rays and laboratory tests that would permit observation of the progress of the pregnancy.

We reached a similar conclusion with regard to the insufficiency of the *labor record*. Specifically, failing to order an X-ray pelvimetry and regularly noting the fetal heartbeats

and frequency constitute inexcusable omissions. As a result of this omission, valuable information about the good sense and wisdom of a vaginal delivery was never had.⁶

6 The scanty elements in the labor record are of little use. After 7:00 a.m., there is no entry of the 7:00 a.m. fetal heartbeats, or of the presentation and position of the fetus. After 9:00 a.m., there are no entries as to the characteristics and frequency of the contractions.

According to the trial court, "the dilatation of the cervix was very irregular, considering that she was primipara, according to Friedman's research which laid the groundwork for what is called Friedman curve used exclusively for primipara females. At 7:00 a.m., the patient has a dilation of two (2) centimeters and two (2) hours later she has a dilation of four (4) centimeters; at 10:00 and 11:00 she continues at 5 to 6 centimeters of dilatation though—we must bear in mind that she is being stimulated with uterine contraction stimulants. From 7:00 a.m. to 1:00 p.m., there is no change in the baby's descent path, described always as (-1) minus one (same); . . . at 12:00 noon there is a fast dilatation of 7 or 8 centimeters which continues until 1:00 p.m., and which is almost the same as at 2:00 p.m.; a note entered at 2:50 p.m. states that only the cervix's anterior lip can be felt, and at 3:20 p.m., it was fully dilated, and at that moment the baby's presentation is still unknown, it is at +1, that is, one centimeter below the narrowest diameter he must go through, but certainly too far inside, what is defined as "OUTLET FORCEPS" (narrow exterior) . . . all during the labor, the nurses' admission notes only state that at 9:30 a.m. the patient was given 5 mg. of valium, at 12:00 p.m. a nurse's note states that the fetal signs were okay, and an annotation of 156 per minute follows immediately below. At that moment, the patient is catheterized to empty the bladder.

[Footnote continued on next page]

It is necessary that the medical profession and the hospital paramedical staff become aware of all the medicolegal implications of medical records. Hirsh, *Medicolegal Implications of Medical Records*, Legal Medicine Annual 171 (1975); O'Sullivan, *Evaluation of the Medical Record*, 21 Med. Trial Tech. Q. 249-270 (1974). "In the past we have censured, with great concern, the slackness in the keeping of the medical record. We must insist on this. It reduces the usefulness of the medical record which can no longer serve the purpose of punctually informing about the fulfillment of the physician's orders, *nor be a source of reference for the evaluation of the treatment and care administered to the patient*. *Lopez v. Hosp. Presbiteriano, Inc.*, 107 D.P.R. 197, 216-217 (1978). Moreover, we have given said omission legal consequences '[i]n view of the almost total lack of credibility which the records presented in evidence deserve from us; . . . this is a case where it is proper to make [an] inference . . . which renders the rule of *res ipsa loquitur* applicable.' *Oliveros v. Abréu*, 101 D.P.R. 209, 230 (1973). *The absence of said entries in the record does not necessarily constitute negligence per se. However, said omission could be a factor to be considered when judging the physician's credibility*

[Footnote continued from previous page]

The progress of this delivery lacks data on dilation; the lack of information as to what part of the baby was presenting, and the fact that, at least as it appears on the Labor Report notes, it only reached +1 when it had fully dilated, was the progress that should have made Dr. Rodríguez de Pacheco suspect throughout the course of the same, if it had been followed as required, that there could be problems with the engagement between that part of the baby that was presenting and the pelvis, calling for an X-ray study of the same." Exhibit 1, at 16-18.

with regard to the treatment he administered to the patient. *Reyes v. Phoenix Assurance Co.*, 100 P.R.R. 869, 878-879 (1972)." *Perez Cruz, supra*, at 731-732. (Underscore supplied.)

Second, although, at the time of the facts, the use of pitocin—"an almost pure oxytocin preparation," Benson, *Diagnostico y tratamiento ginecoobstétrico* 685 Mexico, Ed. Manual Moderno (1979)—*per se* did not constitute negligence but, absent the record, it leaves much to be desired. Let us see. On this particular, the testimony of expert Dr. Silvio Vélez Estrada is revealing.

[P]itocin itself could have been involved in or be the cause of the *asphyxia neonatorum*,⁷ re-

7 *Asphyxia Neonatorum*: "Failure of a newborn to breathe immediately after delivery is referred to as asphyxia neonatorum. There are many reasons why a baby may not breathe at birth. Some of these reasons result from conditions occurring before delivery, some after. Some are the result of complications in the mother. Some may be due to the effects of drugs given to the mother before birth or to injury to the newborn during labor or delivery. Some complications are the result of abnormalities within the baby itself. Among conditions which may be responsible from a maternal standpoint are illness within the mother, abnormal contractions of the womb, infection in the womb, diseases of the placenta, compression or abnormalities of the umbilical cord, and bleeding from the womb. Drugs given to the mother may prevent the centers which initiate breathing from responding. Breathing may be inadequate due to aspiration of blood and secretions in the birth canal or to defects in the development of the infant. The heart may not be normal, or there may be abnormalities in the breathing passages or defects in development of the brain. Diseases of the newborn may interfere with adequate breathing, such

[Footnote continued on next page]

ardless of how it was used. Pitocin itself could choke off the blood vessels that go from the fetus . . . from the placenta . . . excuse me, the blood vessels that go from the mother to the placenta, and this means that, at that moment, the baby's oxygenation stops. . . . These blood vessels are strangulated because they cross—between—the very muscles of the uterus and when contractions come, for each contraction of the uterus brought about by pitocin itself well, oxygenation is not sufficient. And within the context of the asphyxia *neonatorum*, pitocin itself could be—and although it is not the function of the neonatologist to deal directly with the mother from an obstetric point of view—this detail is very important for the neonatologist, without getting involved with obstetrical problems, but that is a detail of great importance in the medical history, and very relevant to this case.

[This is aggravated by a contracted pelvis, because] it will block the baby's birth. Consequently, the trauma and the intrauterine anoxia will be greater. (April 8, 1981, Tr. Ev. pp. 52-53.)

The evidence indicated that certain precautions should be taken before using pitocin. The first precaution is that a

[Footnote continued from previous page]

as those involving the blood or lungs." 4A Gray, *Attorneys' Textbook of Medicine* sec. 206.25, New York, Matthew Bender (3d ed. 1986).

real hypotonic dysfunction must exist, preventing progress of labor; labor must have almost ceased. As to this precaution, according to the particular facts of this case, Dr. Vélez Estrada testified that it was evident—according to a note in the record—that there had been no uterine dysfunction. According to Dr. Rodríguez de Pacheco's description, Riley was in active labor. At 7:00 a.m., effacement was at 50% and labor was following a more or less normal course. The patient had contractions

. . . every five minutes, according to the records, the fetal signs were normal, the only thing is that it was minus one (-1), but we cannot determine what that meant at that time. At that moment, though, they rupture her membranes and she was administered pitocin, there is no hypotonic [*sic*] dysfunction. A hypotonic [*sic*] dysfunction is, simply when labor—as described here—either stops or does not progress, which, according to the descriptions, is not what was happening here. . . .

The second requirement . . . [t]he patient must be in true labor, not in false labor, or in prodromal labor. We could work out an equation between "prodromal labor" and, perhaps, the latent phase of labor described by Friedman. That is, those are the first hours when regular contractions begin. . . . That is prodromal labor; it is different from a false labor where there is really no labor because there is no effect on the cervix, there is no dilation, or other things that usually come with labor. The only valid evidence of labor is cervix effacement and progressive dilation. Even if the process has stopped, dilation must have progressed by three or four centimeters. One of

the most common obstetrical mistakes is trying to stimulate labor in patients who are not in labor. Oxytocin in these cases will only invite trouble. . . . The second precaution was not taken either . . . [b]ecause the patient had only two centimeters when pitocin was administered . . . [it s]hould have reached at least three or four centimeters. . . .

The third requirement . . . "[t]here should be no mechanical obstruction for a safe delivery, as determined by all the available evidence, including roentgenological studies, that is, X-ray pelvimetry of the pelvis and of the fetal head. . . . [S]ometimes there could be a mid-pelvic contraction or an undiagnosed front presentation" . . . [Was not met, there is not even] . . . a slight idea of the size of the fetus, or of the pelvic capacity.

The [fourth] precaution . . . "[t]he oxytocin should not be used in cases of uterine hyperdistention, as, for example, those cases where the baby seems to weigh more than four thousand grams . . ." "[I]f precaution number three was not taken, that is, determining the size of the fetal head, well, evidently, the fourth precaution—avoiding the use of pitocin in an overdistended uterus—was not taken either . . . [T]he fifth precaution . . . , a multipara, that is, a patient who has borne five or more, a patient who has given birth to five or more living babies at full term. In general, they should not be administered pitocin because the uterus may be ruptured more easily than that of patients who have had less labors. For that same reason, pitocin should not be

used in patients over 35 years of age. In this specific case, then, the precaution does not apply because the patient is not multipara, she was not over 35 years at the time of the facts; so it is not practical.[”]

The sixth condition or precaution is that the condition of the fetus must be good, as evinced by a regular heartbeat and the absence of meconium-stained amniotic fluid. . . . we believe that, in this case, the precautions were [not] taken because we do not have, save for the first taking, the number of fetal heartbeats . . . with two additional exceptions . . . when pitocin was first administered, that it had 140 per minute . . . , at noon on that same page there is a fetal rate reading of 152 per minute. And at 2:00 p.m., despite the fact that fetal heartbeats are listed as okay, the specific number per minute is not entered, it only says “okay.” In between there is a note that there are uterine contractions every two minutes.” (March 18, 1981, Tr. Ev. pp. 231-239.) See Hellman & Pritchard, *supra*, at 844-849.

In short, Dr. Rodríguez de Pacheco incurred negligence when, fully unaware of the characteristics of the pathway to be traversed by the baby, she added to the intravenous serum five units of Syntocinon to stimulate uterine contractions while rupturing the membranes.

Third, the record bears no periodic entries of the fetal signs. This information is critical and failure to report the same is an inexcusable error. It was necessary for determining whether during labor the baby was in fetal distress. Physicians are unanimous as to the fact that fetal heartbeats are of incalculable diagnostic value during labor. B. Z. Ficarra,

Surgical and Allied Malpractice 394, Illinois, C.C. Thomas (1968). It is by this means that the heartbeats' nature, regularity, tone, and strength come to be known. The number of heartbeats during labor is also important, as is the fetus response before and after a contraction. (March 17, 1981, Tr. Ev. p. 166.)

Dr. Vélez Estrada explains once again that fetal heart tones are usually checked every fifteen minutes; at times one can hear them now but not fifteen minutes later. This has given rise to the development of monitors. Let us quote from his testimony:

[Fetal signs are important because] through them we know, number one, whether there is a compression by anoxia of the umbilical cord or a failure in the situation of the placenta, and they also tell us the fetus's response to the same . . . that is why at the onset one always checks them every fifteen minutes, or used to check them, because one had a shorter interval to check the fetus's response. That is, normally the fetus must . . . the number of heartbeats per minute drops during the contraction precisely because the flow of blood and oxygen to the brain drops. When the contraction is relaxed and goes back to normal, good oxygenation and good placentarian circulation, and maybe, well, there is no umbilical compression, and the fetus simply responds before the next contraction by regaining the normal number of heartbeats fairly quick. For example, a fetus may be having 144 heartbeats per minute. . . . [for] [e]xample, a . . . a fetus would normally have 144 heartbeats per minute, the contraction comes, it is a strong contraction and heartbeats may drop to 130, 128,

and as soon as the uterus relaxes—and the blood starts flowing again—well heartbeats increase again to a rate of 140 or 144. . . . Research shows, for example, Dr. Horn and Dr. Caldeyro Barcia, in Uruguay, established that this did not indicate fetal distress between those . . . between those rates, 120 to 160. Now, when they drop below 120, then they have to be more carefully monitored, although, nowadays, that does not necessarily mean that we must run to terminate a pregnancy because something is going to happen to the fetus. It could be . . . that the patient was resting on her right side [T]his means that one must make certain decisions, such as administering a certain number of “liters” of oxygen per minute to the mother, and turning her to rest on her left side, trying to find why the fetal signs are dropping, if possible, and for this one can refer to the record if notes have been taken to such effect. Eventually, both Dr. Caldeyro Barcia and Dr. Horn have determined that once fetal heart tones drop below 110 in one case or below 100 in another case, because their opinions vary, well then, we’re having . . . fetal distress. The same thing happens when the heartbeat rate is over 160, with a difference; fetal tachycardia, that is, when the heartbeat rate is over 160, it is not so significant in terms of fetal distress, and in terms of the need, which at times makes intervention imminent and quick, is not as significant as bradycardia, that is, a drop in fetal heartbeats, and they may reach 180 and, at that rate, well, perhaps, one would still be thinking about giving oxygen, observing and

examining and possibly even ordering—if one has not already done so[—]a pelvimetry, some other type of test, etc. That is to say, that, an increase is not so . . . meaningful as a drop. (March 17, 1981, Tr. Ev. pp. 169-173.)

The *fourth* element of negligence, within the particular circumstances of this delivery, was the use of forceps.⁸

8 Again, Dr. Vélez Estrada's testimony is illustrative:

"Then we go into the type of labor and it says whether it was spontaneous or induced and it does not mention the fact . . . [Y]es, excuse me, it mentions it, okay . . . [f]orceps applied, the forceps are described as [low forceps], and the type used was Simpson forceps. This adds another set of problems to the management of this lady's labor from the point of view of neonatology, and considering that I have a baby that is having problems in being born, that, in addition to this, during labor management, the fetal heartbeats are increasing, who is being managed with pitocin, who is being administered a medicine that contracts the uterine muscles, interrupting fetoplacental oxygenation, and that, also forceps are applied, a patient that, as we know, showed meconium, showing that this patient or this baby doubtlessly suffered intrauterine anoxia, I have not the least doubt that because meconium passed in a [vertex] presentation; from a neonatological point of view, she suffered respiratory distress. And, in addition to this, forceps are applied—as done in this case—in a way that could have caused more craniocerebral trauma and the cerebral hypoxia, anoxia, the baby could have suffered could have increased. And, we see that these forceps were applied, the low forceps, in a position where by definition, the definition of low forceps does not apply, additional compression had to be applied, from the neonatological point of view—and please note that I am not

[Footnote continued on next page]

Fifth, considering the course of the events, Dr. Rodríguez de Pacheco did not take the pertinent measures to face the risks and complications of the delivery. The learned trial court concluded:

Under the circumstances of this case, Dr. Rodríguez de Pacheco should have made arrangements to require the presence of an anesthesiologist or anesthetist skilled in child endotracheal intubation, and the nursing team with the necessary facilities to take immediate care of the baby in case the air passages, temperature control, and other conditions had to be restored; that in the face of a crisis suddenly superimposed on prolonged suffering, immediate action can be taken, where each one performs the task assigned to him within this treatment scheme. In this case there was no anesthesia service, not even a nurse anesthetist when baby Sylvia Perez Riley was born. Evidence was brought to the effect that hospitals keep a team on duty that may be at

[Footnote continued from previous page]

the obstetrician but a mere neonatologist—indicates that a little more pressure must be put on the head in an abnormal position for the application of forceps and this may cause craniocerebral trauma. Let us imagine that this baby had no initial respiratory problem and that delivery would have been completely natural, the mere fact that forceps were applied in that position would raise a possibility—in prognostic terms—even though minimal, of craniocerebral damage. And a neonatologist must consider all these alternatives.” (April 8, 1981, Tr. Ev. pp. 124-126.) (Underscore supplied.)

the hospital and come immediately to provide the necessary services. This excuse was not even offered in this case, consequently, patient Sharon Riley was brought into the Delivery Room at 3:30 p.m. and elective surgery had not been agreed yet, while the anesthesiologists were in the Surgery Room next to the Delivery Room.

Had any trouble been anticipated, the anesthesiologist could have been at the Delivery Room when the baby was extracted with what were erroneously called "outlet forceps," and later "low forceps" a baby in distress, according to the evidence furnished, by the passage of meconium. Exhibit 1, at 20-21.

And, *sixth*, the poor and incomplete Apgar Score⁹ report. The Apgar Score number was not recorded nor the time of

9 Apgar Score: Describes a system developed by anesthesiologist Dr. Virginia Apgar for measuring the following five characteristics of a newborn—after one minute and after five (5) minutes: a) heartbeat rate; b) skin color; c) response to stimulation; d) quality and frequency of baby's crying vis-à-vis a normal baby; and e) whether or not the palms of the hand or the feet are bluish. "Immediate assessment of the newborn 1 and 5 minutes after childbirth is a valuable systematic process (Figure 36-1). The newborn at its best (Apgar Score 8-10) is robust, pink in color, and crying. A moderately depressed infant (Apgar Score 5-7) is cyanotic, with low and irregular breathing, but good muscular tone and reflexes. The intensely depressed infant (Apgar Score of 4 or lower) is flaccid, pale or bluish, is apnoeic and has a low heart rate. The Apgar Score at 5 minutes is a useful indicator for neonatal,—and long range prognosis."

the reading mentioned. As a result of this the pediatrician or the neonatologist did not have such vital information for the management of the baby. (April 8, 1981, Tr. Ev. p. 37.)

[Footnote continued from previous page]

"Figure 36-1. Valuation of newborn infant. (Apgar Score.) One (1) and five (5) minutes after the complete birth of the product (excluding the cord and the placenta), the following objective signs must be observed:

	Points	0	1	2
1.	Heart Rate	Absent	Slow (<100)	>100
2.	Respiratory Effort	Absent	Slow, irregular	Good, crying
3.	Muscle tone	Flaccid	Some flexion of limbs	Active movement
4.	Response to catheter, nose catheter (after oropharynx has been sucked)	None	Gesture	Cough or sneeze
5.	Color	Blue or Pale	Pink, Blue limbs	Completely pink

Benson, *Diagnóstico y tratamiento ginecoobstétricos* 763-764, México, Ed. Manual Moderno (1979).

A sound medical practice requires physicians to report the one minute Apgar Score and to make sure that the evaluation is performed.¹⁰

The records are not clear as to the time when the Apgar Score was taken. It is not entered in the appropriate space. In view of this problem, the trial court concluded that it was taken at 15 minutes. It based its finding on the nurse's notes where 15 minutes is entered under Apgar Score. Based on this fact, it is clear that the baby was in very bad shape at that moment. The evidence is consistent and supports, this appreciation.

10 "It is important to know the one minute evaluation: [I]t will determine the immediate intrauterine difficulties of the baby [and project] the magnitude of the interference. The five minute Apgar will determine the baby's prognosis for a specific future. If we compare, let's say, per[centages] in terms of the amount of damage sustained by the baby, for example, a 1-3 Apgar, and we'll see that if we evaluate the first minute Apgar we can have an assessment of 3, more or less 3.4% brain damage, and if we take this same 1-3 Apgar and assess it at five minutes, the assessment doubles to 7.4% of brain damage. Which means that in terms of these five minutes, in terms of one year the incidence of brain damage doubles in terms of Apgar assessment from 1-3 the first minute and after five minutes. When we consider Apgar scores from 4-6, in the first minute there is about 2.8% of brain damage, and the assessment at 5 minutes shows a 5.3% more or less, but for a one-year term, which means that in such a short time (five minutes) between the two assessments, the prognosis and complications—as a result of complications the baby had during such short span—are doubled. That is why it is so important to know the one and five minutes assessments, and, in some centers, ten minutes assessment." (April 8, 1981, Tr. Ev. pp. 38-40.)

Summing up, the evidence weighed by the trial court—and separately by this Court, including the expert reports and the documentary evidence (books and periodicals)—¹¹ amply supports Dr. Rodríguez de Pacheco's negligence which may be summarized as follows: 1) inadequate prenatal care; 2) inadequate management of pitocin without following the standards established for its use as, for example, practicing a pelvimetry, etc.; 3) incorrect application of forceps; 4) improper evaluation of the patient and of the critical state of the fetus; and 5) inadequate and nonaggressive treatment when baby was born in the conditions she was born. Exhibit 1, at 25-26.

The same conclusion is in order with regard to the treatment received by Sylvia at the hands of Dr. Zeni. He did not comply with the standards of an accepted medical practice. Let us see.

Plaintiff contends that Dr. Zeni did not give the baby the adequate treatment and that he abandoned her. Dr. Zeni alleges, on the other hand, that the resuscitation treatment was adequate. The treatment only involved application of a laryngoscope, suctioning secretions and turning on the infant respirator, oxygenating the lungs through a small mask. *He did not intubate her.* The procedure took less than one minute. The physician then observed her respiration; he alleges that, once the baby was in the hands of a pediatrician to be transferred to the Nursery, he left. The trial court rejected his

11 Burke-Strickland & Edwards, *Meconium Aspiration in the Newborn*, Minn. Med. J. 1031-1035 (1973); Gregory, Gooding, Phills & Tooley, *Meconium Aspiration in Infants—A Prospective Study*, 85 The Journal of Pediatrics 848-852 (Dec. 1974); Hellman & Pritchard, *supra*; John J. Bonica, *Obstetric Analgesic and Anesthesia*.

version and accepted plaintiff's theory. We agree with the trial court.

The girl had made meconium¹² while inside her mother's womb, which detail, considering her presentation, was an indication of fetal distress.

One of the experts stated that the following risks were foreseeable in view of the fact that the girl had made meconium and in view of her presentation:

The baby breathes while inside [the] uterus and the amniotic fluid circulates through the lungs. This is the way the elasticity of the lungs is maintained, ready for the moment when the baby is born and begins to breathe spontaneously. If, for any reason, the amniotic fluid is loaded with meconium, the fetal distress that produces meconium which will obviously go into the amniotic fluid and on the surface of the baby's body, specifically a baby that is coming with its head up, over the areas where respiration is easier, we cannot but presume that a baby in this condition that is all covered with thick meconium and with a thick and sticky discharge must somehow have aspired meconium. . . .

Aspiration of meconium, which is usually suspended in the amniotic fluid, which also has ver[n]ix [c]aseosa and other ver[n]ix of the fetus, usually causes aspiration pneumo-

12 Meconium: The mucilaginous greenish material which is in the intestine of a full-term fetus. It consists of the secretions of the intestine and the amniotic fluid.

nia. And, this aspiration pneumonia may manifest itself and usually manifests itself as asphyxia *neonatorum*, it is one of the most causes described, asphyxia *neonatorum*, it is one of the most common causes described, asphyxia *neonatorum*. With regard to the meconium aspiration syndrome, studies also report and there's literature reporting that even in those babies where aspiration could have been minimal, neonatal and perinatal mortality and morbidity usually skyrocket in these cases." (April 7, 1981, Tr. Ev. pp. 151-153.)

Further on, he states:

The meconium aspiration syndrome has been reported in 1.9% of newborn infants with meconium stains in the amniotic fluid with a mortality as high as 28%. Thus, management of newborn infants with meconium aspiration must be impeccable. The purpose of resuscitation must be notified at any time there is meconium-stained amniotic fluid present at childbirth. Ever since Carson's study it has been suggested that pediatric and obstetric services should join forces to deal with the syndrome where meconium is present in the amniotic fluid. In this study, intrapartum nasopharyngeal suction was used to reduce the incidence of the meconium aspiration syndrome from 1.9% to 0.4%, and to reduce the mortality rate to zero. As soon as the head of the baby appears in the perineum and before the shoulders come out, the obstetrician must introduce a DeLee suction catheter into the baby's nostrils at the nasopharynx level and aspire any meconium or mucus. The mouth

and the hypopharynx must be suctioned. Following this process, the pediatrician must intubate any newborn infant with meconium in the umbilical cord. If the nasopharynx is not aspirated before the baby's body is born, the recoil, or elastic recoil, the elastic bounce effect on the chest that triggers off the first respiratory effort, would allow aspiration of meconium into the tracheobronchial tree. In this situation, the trachea must be intubated and meconium aspirated until the tracheobronchial tree is completely free from secretions. Chest physiotherapy every hour is indicated from then on until no more meconium can be seen in the secretions . . . if the newborn infant also has asphyxia, the asphyxia management described above must follow the suction of the pharynx and/or trachea. In any event, the newborn infant must be carefully observed for the next hours. A chest X-ray would corroborate the meconium aspiration syndrome diagnosis, eliminating the possibility of pneumothorax or pneumomediastinum, which, however, must still be suspected . . . in any case where the infant's condition deteriorates. The most difficult aspect of treating this illness is the persistence of lung hypertension that can lead to severe hypoxia. The use of Tolazoline hydrochloride has been helpful in the management of patients with lung vasoconstriction[.]” And that's the end of that section. (April 7, 1981, Tr. Ev. pp. 182-184.)

There is controversy as to when Dr. Zeni arrived at the Delivery Room answering the emergency call. He contends that, according to Riley's own testimony, he arrived at 4:37

p.m. She alleges, on the other hand, that given her condition at the time, it was very hard for her to tell the exact time. She alleges further that Dr. Zeni was the one who gave an Apgar Score of 6 to the girl and this was 15 minutes after she was born. Under this premise, this must have been at 4:27 p.m.

We know that the baby was born at 4:12 p.m. and that she was admitted to the Nursery at 4:45 p.m. Thirty-three minutes elapsed between these two events. In this period of time Sylvia was born; the emergency took place; in view of her poor condition, Dr. Rodríguez de Pacheco and the Delivery Room nurses—after the routine treatment—administered oxygen to her; late on, Dr. Zeni was called; he came right away; in less than one minute, he resuscitated the baby, observed her and a while later decided to leave. Although the trial court was silent in this respect, and the parties did not mention it in their briefs, evidently an event took place at the Delivery Room between Dr. Zeni and Cristino Perez Febo, the father of baby Sylvia. It thus appears from item 11 of the amended complaint and Dr. Zeni's answer. The incident took place when Perez Febo started taking photos during the resuscitation treatment. Dr. Zeni objected. He considered it an imprudence and they had an argument. We do not know how much time elapsed and how this could affect Dr. Zeni's attitude. We do know, however, that his treatment was insufficient and incomplete and that the baby's serious condition required more help. As we said before, a pediatrician answered the call and took the baby to the Nursery at 4:45 p.m. He described his intervention as follows:

When [patient] was born yest[erday] afternoon, I was called on the radio while I was leaving the hospital. I went immediately to the Delivery room [and] found that the [patient] was in resp[iratory] distress. Had retractions, had a grunt. P[atient] was [lightly] cya-

notic and the [Labor room] personnel was given [sic] ox[ygen and] stimulation to the baby. I took [the patient] down to the Nursery for the management of an acutely ill baby [, and] gave the baby to Dr. Rodríguez who was waiting for the [patient] at the [N]ursery.¹³ Physician's note, at 5.

In view of this, it is evident that baby Sylvia had another respiratory arrest after she was treated by Dr. Zeni. Certainly, his version that he stayed in the Delivery Room until the baby was given to a pediatrician and was breathing normally clashes against and is incompatible with the evidence, particularly with the respiratory difficulty that the pediatrician described and evaluated as "acutely ill."

As we said above, the evidence and the expert testimonies point out that the girl started to suffer brain damage inside the uterus, but that the lack of due treatment at the moment of birth and shortly afterwards aggravated the brain damage. In the chronology of events—although to a lesser degree—Dr. Zeni helped aggravate the damages caused by Dr. Rodríguez de Pacheco's negligence. His intervention was very brief and he did not intubate her. He left too quickly. "Abandonment is not a type of negligence indicative of incompetence or malfeasance, such as when an instrument is left in a patient, when a diagnosis is improperly made, when a wrong prescription is given, or when a slip of the scalpel has occurred. Rather, it arises from nondiligence, non-vigilance or inattention that may occur after the above errors." Mains, *Medical Abandonment*, Med. Trial Tech. Q. 307 (1985).

13 [Translator's Note: This footnote contains the English text of the Physician's note.]

Riley's experts showed that the treatment was inadequate. Documentary evidence was also furnished showing what since 1973 has been considered the best medical practice for cases like Sylvia's. Reference was made to Dr. John J. Bonica's well-reputed article when he mentions that, in the different categories of respiratory depression, the vital functions accompanying respiration should be maintained in order to get better body response. This was not done in this case. The photographs presented in evidence show that the girl was placed on a stainless steel table, completely naked. The nurses are shown working on her in an effort to restore her respiration. In the background one can see what appears to be a crib with a heat lamp over it. That is the table where the baby should have been placed. The learned trial court understood that this was uncontroverted evidence of the fact that, even though the means and instruments were available, none were used to keep the baby's body heat.

Referring to Dr. Zeni's conduct, Dr. Juan J. Hernández Cibes stated:

We don't know why there is not one single note in the record of this physician—who was vital for treating this girl—with regard to which were the first steps taken in the process of treating the girl, save for a note entered by the pediatrician in the record of the girl and an answer to an interrogatory. This total absence of direct information by the anesthesiologist, which could have shed valuable light on the baby's future treatment or on the damage caused to the girl at the time; look, the mere fact that he did not enter anything in the record constitutes inexcusable negligence. I'm not omitting minor details. Number two: It is evident that by failing to comply with what we just said, the anesthesiologist did not adminis-

ter the adequate treatment to this girl. And, in this case, the reason could have been that he did not comply with what we said or because he didn't know, but, basically, he states in an interrogatory that his treatment is the one accepted by the practice of medicine; it consisted of a suction of the nostrils, a suction of the laryngopharyngeal area, of secretions that, according to the pediatrician's note—which is the only information we have—were very thick and a "respiratory grunt," is mentioned which is what apparently satisfies the fact that the necessary treatment was administered, as also, once the area was cleaned, the application of the positive pressure mask which, as we said yesterday, should not be used for the reasons we already mentioned—if you wish, I'll explain them again—it does not have a mechanism to control the pressure which inflates the lungs of the baby and, therefore, two things happen: if there is meconium in the trachea and bronchi, throughout the tracheobronchial tree—as described—there was no chance to suction these because the pressure exerted by the mask, the positive pressure, cannot be controlled. He could have intubated the girl, which is the practice to follow according to the medical rules in this case and in this country, and has been the practice since 1974, and is what is recommended and what we have read. It does not determine two additional states which, as we said yesterday, are basic in treating a severely asphyxiated newborn infant, as, for example, taking a small blood sample for PH to see whether or not the blood is acidic, and determining the pressure of arte-

rial blood gases, specifically oxygen and carbon dioxide and, look, if somebody knows about it is the anesthesiologist. Not only in the case of babies, but in the case of any patient, because that's one of the most important areas in the practice of anesthesiology. This was not done, there is no evidence that it was done, it does not even appear from the only evidence we have, which is the pediatrician's note. We cannot even excuse it by saying. . . . (April 8, 1981, Tr. Ev. pp. 39-42.)

In short, the following determination correctly summarizes Dr. Zeni's negligence:

Dr. Zeni was called to the Delivery Room to give emergency treatment to baby girl Sylvia Pérez Riley, who, according to his own description, was in a respiratory depression, retracting and cyanotic because she had suffered intrauterine cerebral anoxia. He administered a highly inadequate treatment which, as he himself described, took less than a minute, and consisted in clearing the baby's secretions and applying oxygen with a newborn infant mask; that after the baby had a favorable reaction, he observed her for a while and then left.

According to the highest medical standards, this girl should have been intubated and placed in intensive therapy. It is evident that Dr. Celso Victor Zeni was grossly negligent when he *abandoned* this girl when she most needed adequate treatment. There is no excuse for this negligence. Exhibit 1, at 24-25.

No valid reason was given to excuse Dr. Zeni's sparing routine. His failure to intubate the baby was crucial. As re-

quired by the Health Department regulations, in the Delivery Room there was the necessary "equipment for resuscitation and facilities for the administration of Oxygen." 24 R. & R.P.R. sec.18-123(e). The findings of the trial court are supported by the evidence. As such, they "[deserve] great deference [absent] extraordinary circumstances or signs of bias, prejudice, partiality or manifest error [warranting intervention of, the appellate court]. The assessment of credibility made by the court of first instance demands respect." *Pérez Cruz v. Hosp. La Concepción*, *supra*, at 728; *Sanabria v. Heirs of González*, 82 P.R.R. 851 (1961).

Dr. Rodríguez de Pacheco and Dr. Zeni failed to give their patients Sharon Riley and Sylvia Parez Riley the "[care that in the light of] the modern means of communication and education, establishes that the level or quality of that care should be that which meets the professional requirements generally acknowledged by the medical profession." *Oliveros v. Abréu*, 101 D.P.R. 209, 226 (1973); *Morales v. Hosp. Matilde Brenes*, 102 D.P.R. 188 (1974); *González v. E.L.A.*, 104 D.P.R. 55 (1975); *López v. Hosp. Presbiteriano, Inc.*, 107 D.P.R. 197 (1978); *Negrón v. Municipio de San Juan*, 107 D.P.R. 375 (1978). The causal relation was also established. We are not dealing here with a situation in which someone is relieved of liability on account of an error of judgment, in good faith, or of an adequate diagnosis or treatment. *Oliveros v. Abreu*, *supra*, at 227-228; *Morales v. Hosp. Matilde Brenes*, *supra*, at 194; *Rosado Rosado v. E.L.A.*, 108 D.P.R. 789, 795-796 (1979). P. D. Rheingold & P. F. Davey, *Standards of Care in Medical Malpractice Cases*, Wetch, Legal Medicine Annual 279-301 (1974).

IV

Damages and Compensation

According to the trial court, baby Sylvia suffered damage to the nervous system resulting from the convulsions

that lasted for some period of time. "The anoxic encephalopathy was due to an insult to the girl's brain due to the lack of oxygen. An anoxic insult takes place when the brain tissue does not receive enough oxygen, it is like an injury or wound, triggering a tissue reaction which can result in swelling, hyperaemia, and even necrosis or loss or death of some cells." Exhibit 1, at 28.

When baby Perez was 4 months old, neurologist Dr. Mirabal Font had the impression that she suffered from spastic diplegia¹⁴ caused by brain damage to the motor portions of the brain, which primarily causes a lack of coordination in the use of the legs. The condition affects the four limbs. The legs suffer more than the arms. The difficulty lies in the voluntary use of the limbs. The word "spastic" means an increased muscular tone with awkward and rigid movements. When the baby girl was 8 months old, the physician determined that her encephalic perimeter was 41 cm, which is below normal for an 8-month-child. The baby also had an immature *ulnar* grip, which means that she used that part of the hand on the side of the little finger. Sylvia dribbled excessively. Dr. Mirabal Font thus confirmed his initial diagnosis of spastic diplegia. The girl's intelligence was near normal, but way below what it should have been.

With regard to this, the court said: [W]hen a baby suffers brain damage to the brain hemispheres, the clinical evidence of this damage does not become apparent while the baby is still a newborn; instead, it slowly begins to show as the baby is supposed to develop and either fails to develop or develops slowly. The reason for this is that the newborn infant does not use the hemispheric circuits when it is born; it starts us-

14 Spastic - increased muscular tone; movements are awkward and rigid.

ing them slowly as it grows. Therefore, it is not until the baby has access to these circuits, that one can see that they are not functioning well. That is how brain damage becomes apparent." Exhibit 1, at 29.

The brain damage suffered by Sylvia affected the hemispheric area called motor cortex. "All parts of the body are represented in this part of the brain: legs, shoulders, face, arms, hands, in different parts of the cerebral cortex. If the person wants to move the hand, the stimulus comes from the lateral cortical part; if the person wants to move the leg, the stimulus originates in the medial part, along the middle line." Exhibit 1, at 30. The damage affected the medial part of the motor cortex near the median line next to the other hemisphere. Because of their nearness, they are frequently involved bilaterally. The left hemisphere controls the right leg and the right hemisphere controls the left leg. Due to this contiguity, in the case of diplegic children, the defect is frequently bilateral and involves both legs. Therefore, Sylvia has difficulty using her upper limbs, but not as much as with her lower limbs. The damage is asymmetrical: she can use the left arm and hand better.

When baby Perez was 14 months old, Dr. Mirabal Font found that the baby's encephalic perimeter was of 43 cm. This was quite below average. Her head was small for her age. Sylvia could follow verbal instructions, and sit but only for a while because she fell. Her limbs were spastic and her coordination poor, although poorer in the legs than in the arms.¹⁵

15 In this visit Sharon Riley learned from Dr. Mirabal Font that the girl had suffered permanent brain damage. It was then that the doctor reported it. He followed his best medical criterion of break-

When the baby was 3 years and 9 months old, on May 17, 1978, Dr. Mirabal Font determined that Sylvia's encephalic perimeter was of 18 inches, which is the normal perimeter for a one-year old baby. Her gait was awkward and she had to hold on to the furniture. The lower limbs showed a marked spasticity, specially in the abductor muscles¹⁶ and also on the Achilles tendons.¹⁷ When she walked, she had a tendency to point her feet inwards. She was shown pictures of animals and objects which she could not identify. Although she understood language, she could not express herself.

The court found that Sylvia "would always have difficulty with the use of her legs and that her gait will always be awkward and difficult. She would find it hard to go up or down the stairs, or to practice sports; dancing would be impossible. . . . [T]he girl . . . does not have the intellectual potential she had when she was conceived; she is not a college prospect, although she could graduate from a vocational school for the handicapped. Had she not suffered those damages, her intelligence would have been superior." Exhibit 1, at 32-33.

In January 1980, Sylvia was submitted to corrective surgery, as a consequence of which she had both legs in a cast for six weeks.

[Footnote continued from previous page]

ing this type of news only when he felt sure, from a professional point of view.

16 The abductor muscles keep the legs together.

17 The Achilles tendon is the heel tendon.

The trial court concluded that Sylvia "suffered permanent brain damage that has crippled her for life, causing her extraordinary limitations which prevent her from leading a normal life for the rest of her life, with the aggravating circumstance that her intellectual capacity—although bordering on low normal—makes her aware of her handicap, which causes her great suffering and emotional distress. . . . [Consequently], she will need care and assistance from other persons for the rest of her life."¹⁸ Exhibit 1, at 33.

18 An evaluation of Sylvia's intellectual capacity made on May 2, 1979, had the following results:

"Sylvia established a basal age at three and a half years, continued making sporadic achievements later on until consistent failure at the seven-year old level. *These results place her within the limits of average normal intelligence when compared to children of the same chronological age.*

"The analysis of the evidence showed *that the girl has a capacity for abstract reasoning and conceptualization above her age.* This means that her internal language follows an adequate development even though there exists a difficulty at the expressive level secondary to her condition.

"Other areas evaluated responded to her ability for discriminating details, differences and similarities at a visual level. *Her performance here was average.*

"*Her area of greatest difficulty is her ability and development of motor coordination. This is due to her physical condition.*

"In general, Sylvia seems to be a girl with adequate intellectual capacity with specific motor coordination problems. *Based on these results, the girl must be placed in children groups of her chronological age.*" (Underscore supplied.)

Sharon Riley suffered damages upon being deprived of nursing and holding her daughter during the baby's first ten days. She knew that the baby had had convulsions. Besides, a Sister of Mercy told her that the girl's condition was very delicate and she had to be given an emergency baptism. Riley returned home without the baby who stayed eleven more days in the hospital. This caused her great concern. Later on, when the baby was three months old, she saw her suffer colics and crying spells. Like any mother, she was desperate because she could not make her feel better. When the baby was about four months old, Riley grew even more concerned when she realized that the baby could not move her right hand easily and that her legs were very rigid. Riley was not yet aware of the reason for this condition. Although the girl was given therapy, Riley was very disappointed. Her concern was greater when she noticed that the girl did not respond favorably to the treatment. Finally, she learned about the irreversible condition caused by the permanent brain damage suffered during childbirth. This happened when the girl was fourteen months old.

As a result of this painful mother-daughter drama, Riley was forced to abandon her career as an actress. This caused her a depression. She certainly had and will have to devote most of her time to the special care of a partially handicapped girl. She had to seek, through the media, financial aid from the general public and from her colleagues in order to travel to the Institute for the Development of Human Potential in Philadelphia, United States.¹⁹

19 According to the evidence, the girl's medical treatment cost \$8,352.90. Riley herself gave her respiratory patterning six hours a day for about three months. This item should not be altered.

The baby's need for intensive physiotherapy and neurological organization forced Riley to reject attractive theater, television, and movie parts. Although the trial court determined that this would have yielded her the amount of \$30,000, we do not think that the evidence wholly supports such conclusion inasmuch as it solely consists of the testimony of some local actors and producers, who testified that Riley could not accept several offers and that she lost more than \$30,000 in income. However, there is no evidence on past earning history. Riley did not testify on any of the jobs offered by the producers, except in the case of Marito Fernández. In our opinion the evidence reasonably supports \$15,000.

As a result of Riley's precarious financial situation, she moved in with her sister. She was very sad because she and her daughter had to depend on her sister for support. We will not disturb the \$100,000 compensation awarded to Riley for mental anguish.

We understand that, in the light of the evidence brought, the amounts of \$500,000 for bodily injury, plus \$300,000 for mental anguish awarded to Sylvia, are exaggerated. *Rodríguez Cancel v. A.E.E.*, 116 D.P.R. 443 (1985). Several factors influence our conclusion. First of all, we must bear in

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The respiratory patterning treatment was described as follows: the girl laid down embracing a vest with canvas straps which ended in crossed wood handles. When the straps were pulled, the girl's thorax was compressed in order to exercise her lungs. This had to be done at a specific rhythm using a timer and by two persons. Every time Riley could not find someone to help her, her anxiety increased.

mind that, because of her tender age, during the first months of her life, Sylvia could not, as such, suffer mental anguish in the legal-compensatory sense. *Correa v. P.R. Water Resources Authority*, 83 P.R.R. 139, 155 (1961). In the second place, upon awarding damages, we are aware that human sorrow and physical pain are not similar or financially assessable. Money and pain "are so different that they are not comparable. But if money does not suffice to redress this type of damage, an insufficient compensation for the victim would be better than none. Thus, although money cannot be compared with pain, the victim may be awarded a compensation which, although it would not restore the loss suffered, it would allow him to procure certain pleasures and psychical or mental satisfactions to mitigate the pain." J. Ataz López, *supra*, at 328. Third, when taken to the real extremes, mental suffering and bodily pain may be quantified ad infinitum. Without reasonable limits, compensation would no longer bear the characteristics of a redress, but would rather become punitive. *Rivera v. Rossi*, 64 P.R.R. 683 (1945). It bears noting that this "interpretation should not be regarded as an underestimation of the reality and honesty of [the] sufferings." *Pérez Cruz v. Hosp. La Concepción*, *supra*, at 739. Fourth, when passing on medical malpractice cases,²⁰ except in cases

20 "If we analyze the [term 'medico'] after Abeille, we may say that in the Indo-European linguistics, the root *med* means 'to think,' 'reflect,' which sometimes has technical values: to 'measure,' 'think,' 'care for a sick person,' 'govern.' Hence 'medear,' or take care of.

"Since its origin, 'medear' appears in the medical language as taking or giving a remedy. From there stems 'medens,' 'medico,' replaced in the classical ear by 'medicus,' with all its derivatives: 'medicine,' 'medicinalis,' 'medico,' 'medicar,' 'medicamentum.'

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involving willful misconduct, we remember "that the healing hand does not reach the degree of social offense of the injuring hand." *Negrón v. Municipio de San Juan*, 107 D.P.R. 375, 381 (1978) (Justice Díaz Cruz, dissenting). Fifth, assessment of damages is an intrinsically complex task. *Polanco v. Tribunal Superior*, 118 D.P.R. 350 (1987). "Assessing a fair and reasonable compensation for damages sustained, would be a challenging task even for a modern King Solomon." 6 *Emotional Disability and Compensation*, Traumatic medicine & Surgery for the Attorney 82, Washington, Ed. Butterworth (1962). Human assessment of elements not visible but intangible (emotions such as pain, joy, sadness, frustration, peace, peace of mind, honor, and others) *is not devoid of a certain degree of speculation*. We try to reach a reasonably balanced award, that is, not extremely low nor disproportionately high. *Urrutia v. A.A.A.*, 103 D.P.R. 643, 647-648 (1975). And, finally, we must see that compensation for damages does not become a lucrative forensic industry where doctors and patients are the raw material.²¹

[Footnote continued from previous page]

"In short, 'medicus' expresses and embodies the sense of meditation and curing action as finality; that is, it involves the beautiful concept of a beautiful and devoted profession.

"But there is no doubt that this physician-patient, physician-society, relationship generates obligations, duties, liabilities." Yungano, López Bolado, Poggi, Bruno, *Responsabilidad profesional de los medicos* 297-298, Buenos Aires, Ed. Universidad (1982). (Underscore supplied.)

21 This phenomenon known as "masificación" (mass production)—and, paradoxically, specialization of medicine—is described as follows:

[Footnote continued on next page]

In consideration of all the factors involved, we deem that the amount of \$400,000 for Sylvia's bodily injuries and mental suffering is reasonable.

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"Nowadays, most physicians (internal and general practitioners, surgeons, anesthesiologists, radiologists, analysts, transfusers, odontologists, rehabilitators, etc.) work in conditions that are not quite clear or are barely defined for them and for the patient as well and the so-called 'socialization of medicine' into which we are heading has come to operate a profound change in the bases of the issue. According to Laín Entralgo, '[s]everal deep-seated historical reasons have determined the strong and progressive *social slant of medicine* in our era.' He points to four reasons. The third one is worth mentioning: 'The inexorable advent of "mass society." No matter how great—he says—a doctor's clinical talent and moral pulchritude, the complexity of diagnostic and therapeutic techniques and (the) massive accumulation of people in big cities requires a "social" structuring of medical treatment. The old "family doctor" can barely make ends meet.' Further on he states that the growing socialization of medicine 'has caused a series of medico-social phenomena' among which he mentions 'the change of the physician-patient relationship' affirming that 'since this relationship is not based on intimate and personal "trust," medical assistance becomes a retained service where the two parties look mainly after their own advantage. The frequency of civil actions brought against physicians—and end quote—is a good indication of this change.'" Prieto-Castro y Ferrándiz, *Responsabilidad médica: proceso médico*, Rev. Der. Procesal Iberoamericana, 707, 711-712 (1975).

V

Other issues

Defendant Dr. Rodríguez de Pacheco holds that she and Dr. Zeni cannot possibly be joint tortfeasors in this case because the said acts or omissions are not contemporary but consecutive. The argument is not correct. One thing is that, due to the nature of the damages, these cannot be attributed to a specific act; and quite another thing is recognizing their solidarity because of their multiple acts, omissions and events that combined to cause them. See: *Sanchez Rodríguez v. López Jiménez*, 118 D.P.R. 701 (1987); *Gines v. Aqueduct and Sewer Authority*, 86 P.R.R. 490, 497 (1962); *Torres v. M.B.A.*, 91 P.R.R. 693, 695 (1965); *Rodríguez Soña v. Cervecería India*, 106 D.P.R. 479, 483 (1977). We reaffirm that in actions of this kind, physicians should be held liable if it is established, by preponderance of evidence, that the combined negligent conducts most probably caused and aggravated the damage. *Cruz v. Centro Médico de P.R.*, 113 D.P.R. 719, 744-745 (1983); *Pérez Cruz v. Hosp. La Concepción*, *supra*.

The trial court did not err upon giving credit to the testimony of Dr. Hernández Cibes. His testimony was backed by the renowned work of Hellman & Pritchard, *supra*, and by other articles. Regardless of how reprobable his pecuniary interest as expert could turn out to be in someone's eyes at the outcome of the case, it does not disqualify him per se nor detracts from the probative value of his expert opinion.²²

22 The testimonies of doctors Fernández Plá and Edith Rodríguez de Pacheco were *not* submitted for review. The petition to request authorization to transcribe testimony only mentioned doctors Hernández Cibes, Vélez Estrada, Mirabal Font, Jimenez Vélez, and Zeni.

The trial court did not err either in refusing to hold a new trial, at Dr. Rodríguez de Pacheco's request, to present in evidence a letter where Sharon Riley thanks her daughter's teachers for their efforts towards the girl's improvement during her stay in a little private school.

Rule 48.1 of the Rules of Civil Procedure governs the situation. It reads:

A new trial may be granted on any of the following grounds:

(a) When *material* evidence is discovered which, despite reasonable diligence, could not be discovered or produced at the trial. 32 L.P.R.A. App. III, R. 48.1. (Underscore supplied.)

The evidence obtained does *not* meet these requirements. Its admission is not essential. Neither would it change the outcome of the action. Besides, that evidence could have been found if due diligence had been exercised. Lastly, the parties had agreed that the defendants could examine the girl at their request. They did not examine her. What are they complaining about?

Granting of a new trial rests on the sound discretion of the trial court. *Ruiz Pérez v. Superior Court*, 94 P.R.R. 396 (1967); *Carrion v. Sampedro*, 74 P.R.R. 385 (1953); *Cuevas Segarra* (II P.P.P.), *Civil Procedure* 328-329. We should respect it.

With regard to obstetrician Dr. Stanley Ascencio, it is alleged that defendants were deprived of their right—under Rule 52 of the Rules of Evidence—, 32 L.P.R.A. App. IV, to call him to the stand because of his character as expert witness. We do not agree. The parties had agreed that the court would use him as expert obstetrician in order to have him explain the terms and the evidence presented and thus speed

up the proceedings.²³ In cases dealing with technical matters, the use of a judicial expert in the process of attaining the truth is a legitimate objective. No right was violated here.

23 In this regard, the following dialogue is revealing:

"ATTY. ALVARADO TIZOL:

"Yes, your Honor, in this article there is . . . we are going back to the same problem in this case, *there are a lot of words, etc., that I think that your Honor should have the benefit of having them explained by a practitioner because they are highly technical medical terms that could confuse the Court, and that is why we bring in those articles, so that the practitioner may explain them as he reads them.*

"ATTY. MIRANDA CARDENAS:

"The Court must excuse me but, if that is the purpose, then we are also going to echo the objection on the following grounds: *If we remember that when this case began, way before the proceedings began, we agreed that your Honor could appoint—as you did—a consultant practitioner on this subject. And that is precisely the purpose of the consultant, so it seems to me, your Honor, that we would be defeating the commitment we made with the Court, if that is the only thing our colleague wants.*" *In view of this guideline, the Court said that it would "consult with the appointed expert."* (April 8, 1981, Tr. Ev. pp 171-172.) (Underscore supplied.)

And further on:

"ATTY MIRANDA CARDENAS:

"No, but I am sure that it is possible that your Honor has a great advantage over us. Your Honor has a *consultant obstetrician*, and your Honor should also remember that *we agreed that he was given leeway to also consult whatever anesthesi-*

[Footnote continued on next page]

Finally, we deem that the attorney's fees should be cut to the reasonable amount of \$30,000.

Once again, by way of epilogue, we wish to state that:

[U]nder the case law rules on the weighing of evidence, we have the legal conviction and moral certainty that it was satisfactorily established that defendants' negligent conducts were the factors that most probably caused the damage.

The judge "[m]ust seek *moral certainty*, excluding any reasonable doubt he might harbor; indispensable qualities to achieve this end are a strict personal moral sense and an intense judicial culture. Hence, he must be fully convinced that there is a need to form an adequate *moral conscience*; a framework to dignify and enlighten his professional life. . . . Conscience—according to Peinador—is the rule of subjective morality and, without it, the objective rule—divine and human law—is practically inoperative. A well-formed conscience is the best guarantee of a morality absolute consonant with the precepts that should lead man's activities, whether general or professional. . . . He must always know how to lend an ear, in the last instance, to the voice of his conscience, the true guide of morality that hardly ever fails when intelligence is illumi-

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ologist your Honor appoints. I think that was part of our agreement." *Id.* at 177. (Underscore supplied.)

nated by science and the will disciplined by morality. We all know about the constant and modulated inflections of that incorruptible voice, fertile advisor, disinterested friend, sometimes smoothly tranquilizing, and others insistently admonishing. F. Soto Nieto, *op. cit.*, at 22." *Nunez v. Cintron*, 115 D.P.R. 598, 619-610 (1984).

In view of the foregoing, *judgment will be rendered modifying the judgment of the San Juan Superior Court. Thus modified, it will be affirmed.*

Justice Naveira de Rodon issued a separate opinion. Chief Justice Pons Nunez disqualified himself. Justice Rebollo Lopez took no part in this decision.

IN THE SUPREME COURT OF PUERTO RICO

Sharon Riley, individually
and in behalf of her daughter
Sylvia Pérez Riley,

Plaintiff and appellee

v.

Nos. R-84-107, Review
R-84-110

Dr. Edith Rodríguez de
Pacheco *et al.*,

Defendants and
appellants

Separate opinion of JUSTICE NAVEIRA DE RODON.

San Juan, Puerto Rico, December 2, 1987

We agree with Parts I, II and III of the majority opinion. With regard to Part IV, we concur in part and dissent in part. We dissent because the majority reduces the amounts awarded to coplaintiff Sylvia Pérez Riley. The reasons given by the majority do not convince us. We believe that the trial court fairly and properly assessed the girl's bodily injuries and mental suffering.

As to Part V, we dissent from that part which cuts the amount awarded for attorney's fees. We concur with the rest. However, we would like to make a few observations in view of the impact and importance the solidarity doctrine—as tortious plural contribution without previous concert in facts generating a single damage—has on the group or joint practice of medicine.

We take judicial notice of the fact that, in modern-day society, scientific and technological advancements have

given rise to the professional specialization and sub-specialization phenomenon, turning the medical act from an individual act into one characterized by a joint, either coetaneous or successive activity of several health care professionals. The group or joint practice of medicine today is the rule, not the exception. These groups of professionals, experts in their respective fields, should be sponsored and encouraged; the patient in the first place and society in the long run, are the beneficiaries of this teamwork.¹

We agree with the majority in that, when, due to the nature of the damage, it cannot be attributed to the specific act of one or several persons, all those who concurred in causing it should be held liable, "if it is established, by preponderance of evidence, that the combined negligent conducts most probably caused and aggravated the damage."

Our law on tort liability is rooted on the principle of individual imputability. Each person is liable to the aggrieved party for the damage caused by his tortious acts or omissions. By way of exception, one person is liable for the acts of others.² Prevalent also is the theory of adequate causality, "ac-

1 On the group or joint practice of medicine and the group or individual liability that it may generate, see: 6 J.O. Ramírez, *Indemnización de daños y perjuicios*, ch. XXXI, § 144(1), items (A), (R), (B), and (C), Buenos Aires, Ed. Hammurabi (1985); A.J. Bueres, *Responsabilidad civil de los médicos*, ch. VI, Buenos Aires, Ed. Abaco de Rodolfo Depalma.

2 To this category belong the liability imposed by sec. 1803 of the Civil Code, 31 L.P.R.A. § 5142:

"The obligation imposed by the preceding section is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

cording to which 'every condition without which the result would not have been produced is not a cause, but that which ordinarily produces it according to the general experience.'" *Soc. de Gananciales v. Jéronimo Corp.*, 103 D.P.R. 127, 134 (1974). Therefore, and also by way of exception, whenever there is a solidarity nexus a person is held liable to the aggrieved person for the acts of another person. With these principles in mind, let us consider the problem of solidarity.

[Footnote continued from previous page]

"The father, and, in the event of his death or incapacitation, the mother, is liable for the damage caused by the minor children living with them.

"Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

"Owners or directors of an establishment or enterprise are likewise liable for any damages caused by their employees in the service of the branches in which the latter are employed or on account of their duties.

"The Commonwealth is liable in this sense under the same circumstances and conditions as those under which a private citizen would be liable.

"Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

"The liability referred to in this section shall cease when the liable persons mentioned therein prove that they employed all the diligence of a good father of a family to preclude the damage."

As a rule, when several persons concur in causing tortious acts that are coetaneous or successive, that generate an indivisible tortious result, it must be solidarily repaired by the tortfeasors. This does not mean, however, that whenever there is a single damage and several persons concur in causing the same, they will automatically and irremissibly be solidarily liable to the victim.

With regard to extracontractual solidarity and its different trends, Cossío points out that Spanish case law has been unpredictable. He says:

At the onset, [Spanish case law] seems to part from the basis of *in solidum* liability, that is to say, that it admits the classical thesis that each tortfeasor is liable for the totality of the damage. Judgments of February 24, 1928, and March 13, 1929.) However, the very Court while solving a concurrent fault problem on February 19, 1959, ruled that liability was joint and then went back to the solidarity theory on February 14, 1964.³

3 De Cossío also tells us that "[a]ctually this is liability *in solidum*, although it does not curtail the judge's authority to moderate the liability of each tortfeasor" pursuant to sec. 1.104 of the Spanish Civil Code. I A. De Cossío, *Instituciones de derecho civil* 309, Madrid, Ed. Alianza (1975). Section 1057 of our Civil Code, 31 L.P.R.A. § 3021, corresponds to the Spanish sec. 1.104, and has to do with the gradation of fault. These sections are applicable to contractual or extracontractual obligations. Section 1057, as well as the Spanish section, reads:

"The fault or negligence of the debtor consists of the omission of the steps which may be required by the character of the ob-

[Footnote continued on next page]

Soto Nieto, on the other hand, says, with regard to extracontractual solidarity, "[t]he most delicate question arises in the case of a double or multiple contribution to the damage when there is no common concert or will among tortfeasors vis-à-vis the cause. The damaging effect appears as the result of a plurality of unlawful coetaneous or successive acts all of which concur toward the efficiency of the cause." F. Soto Nieto, *La responsabilidad civil derivada del ilícito culposo* 87, ch. III, sec. II (B), Madrid, Ed. Montecorvo (1982). About solidary liability, he goes on to say that "the essential thing is detecting the causality nexus, that the damage caused may be morally chargeable on several authors." *Id.* at 87. Shared solidarity necessarily crops up "[i]n view of the repetition of accidents and *the impossibility of determining the exact origin of the results*, the common and solidary response is the efficient means of facilitating the action of the injured party. *Id.* at 88. (Underscore in the original.) Soto Nieto clarifies that this joint liability is a consequence "of multiple and coinciding causality, [and of the fact that no] part of the damage is chargeable pro party." Soto Nieto, *supra*, at 88. He points out that "[w]hen *a portion of the damage is attributable to each action, the injured creditor must divide his action in proportion to the liability of each coauthor.*" *Id.* at 90. (Underscore in the original.) Under these circumstances, each actor "will have, without any

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ligation and which may pertain to the circumstances of the persons, time, and place.

"Should the obligation not state what conduct is to be observed in its fulfilment, that observed by a good father of a family shall be required."

soldarity nexus, the portion of the *damnum* for which he must answer." *Id.* at 90.

Santos Briz follows this line of thought when he says:

In case of an individual author, sec. 1.902 [sec. 1802 of the Puerto Rico Civil Code] establishes his concrete liability; when there are several authors, the rule cannot be different: that is, sec. 1.902 will be applicable to each and that is why all are liable. Then we have the problem of how to organize this joint liability, and we reach the conclusion that the only logical solution is to hold them all solidarily liable, save in case that, according to the circumstances, the damage caused by each may be discerned, in which case, we are no longer dealing with a joint liability case, which we have only when there are several tortfeasors to the damage, there being no possibility of *singling out the individual intervention of each*. J. Santos Briz, *Derecho de daños*, 292, ch. VIII (II) (B)(2), Madrid, Ed. Rev. Der. Privado (1963). (Underscore supplied.)

Argentinian commentator Isidoro Goldenberg focuses on the problem as follows:

The propriety of compensation in cases of damages caused by groups, when the lack of identification of the author produces the tort, necessarily leads to a conflict of assessment that shocks the very foundation of the civil liability system.

In fact, on the one hand, what is at stake is the principle of individual imputability, which rejects the imposition on an individual of the

obligation to redress a tort he has not caused; from the point of view of the victim's rights, the position is reversed: should the unfair damage caused by the group be suffered by the victim alone?

Essential to this kind of liability is the non-individualization of the material author of the damage, reason why, once he has been identified, the other members of the group are released from any obligation. It is also necessary that each one of the authors show that he could not possibly have caused the damage according to the circumstances of each particular case. I. H. Goldenberg, *La relación de causalidad en la responsabilidad civil* 152-153, ch. VI, sec. 37(b), Buenos Aires, Ed., Astrea (1984). (Underscore supplied.)

In view of the foregoing, we could gather that in malpractice cases such as the one at bar, where two or more physicians concur in causing successive torts, absent common concert or will, and they cause or aggravate a single damage, they will be solidarily liable to the injured party unless they can individualize the damage caused by each one of them in which case the solidarity will no longer exist and each will only answer for the portion of the damage he has caused. In the case at bar, neither Dr. Edith Rodríguez de Pacheco nor Dr. Celso Víctor Zeni individualized the damage; hence, they are solidarily liable for all the damage caused to Sylvia Pérez Riley and her mother Sharon Riley.

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No. 05-721

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IN THE
Supreme Court of the United States

TURABO MEDICAL CENTER PARTNERSHIP,
dba HOSPITAL INTERAMERICANO
DE MEDICINA AVANZADA,

Petitioner,

v.

MARIA YOLANDA MARCANO RIVERA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

CARLOS A. RUIZ
P.O. Box 12980
Caguas, P.R. 00726-01298
(787) 286-8775

JORGE M. SURO-BALLESTER
Counsel of Record
1225 Ponce de León Ave., PH-2
San Juan, P.R. 00907-3921
(787) 724-5522

Counsel for Respondents

198634



COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The First Circuit Court of Appeals affirmed a medical malpractice award of \$2.585 million to a severely brain-damaged child – Baby Fabiola – and her parents against a hospital, on facts that were largely uncontested in the trial court and are, in any event, conceded for present purposes. It is undisputed that, because of petitioner's negligence, Baby Fabiola will never see, talk, or walk, and that her expected life span is 35 to 45 years. The question presented is:

Should this Court grant review to consider whether the First Circuit erred in concluding that, under Puerto Rico case law, as authoritatively interpreted by the Puerto Rico Supreme Court, the verdict would not have been considered "exaggeratedly high" and would not have been remitted.

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STATEMENT

Petitioner Hospital Interamericano de Medicina Avanzada ("HIMA") asks this Court to reduce by 50% a \$2.585 million jury verdict to Fabiola Rodriguez Marcano and her parents. The verdict was based on the jury's finding that HIMA was negligent in monitoring the birth of Baby Fabiola, and that its negligence contributed to Fabiola's severe and permanent neurological damage. Baby Fabiola will never see, walk, or speak, and will require a caregiver for the rest of her 35 to 45-year life span. First Circuit Opinion, Pet. App. 5a. At trial, HIMA's defense focused on attributing blame to Dr. Pedro Roldan, the non-employee obstetrician. As HIMA itself put it, the hospital "'presented no evidence to offset Fabiola's and her family's damages. We agree that she has suffered serious damages, both the baby and the family. Our sole issue with the damages is not to negate [their] existence, but to make clear that it was Dr. Pedro Roldan, and not HIMA, [who was] the responsible party.'" *Id.* 18a. Its trial defense having foundered, HIMA, grasping at straws, switched gears and argued post-trial that Fabiola's and her parent's injuries were not that serious, and thus the verdict was excessive.

HIMA repeatedly and misleadingly refers to a \$5.5 million dollar verdict. Because the jury apportioned 47% of the fault to HIMA and 53% to Dr. Roldan, HIMA is only responsible for \$2.585 million of the judgment. The remainder will never be received by the Rodriguez family since they settled their claims against Dr. Roldan for \$500,000 prior to discovery. HIMA only has standing to contest the \$2.585 million. According to the jury's verdict the \$2.585 million was divided in the following manner: \$1,880,000 for Baby Fabiola, of which \$893,000 was for

future health care costs, \$822,500 for mental and physical pain and suffering, and \$164,500 for loss of income; \$470,000 for Fabiola's mother, and \$235,000 for Fabiola's father, for pain and suffering.

The evidence at trial showed that Maria Marcano Rivera ("Marcano") was admitted to HIMA for a scheduled induction, and due to the gross negligence of the obstetrician and the hospital, the fetus suffered neonatal asphyxia, resulting in catastrophic and permanent neurological damage. *Id.* at 5a. "Fabiola continues to suffer from daily seizures, and her prognosis is grim. Although she has an anticipated life span of 45 years, she will never see, walk, or communicate, and will require a caregiver for the rest of her life." *Id.* In support of its refusal to reduce HIMA's 47% of the award, the First Circuit found "ample evidence of the severe physical and emotional toll that Fabiola's permanent injuries have inflicted, and will continue to inflict, on both her and her family." *Id.* at 17a

Petitioner's recitation of the facts seemingly follows those noted by the First Circuit, however critical elements are conveniently omitted. Petitioner does not mention that Baby Fabiola's prognosis, as well as her 35 to 45 year life span, was stipulated by the parties. *See App., infra*, at 1a-4a, Stipulated Facts, no. 15 (regarding prognosis); *App.* at 5a-6a, trial tr. pp. 227-28 (35-45 year life span). Moreover, the life care plan prepared by one of respondents' experts established that Fabiola's past and future medical and life care needs, based on this estimated life span, alone amounted to approximately \$1.9 million. *Pet. App.* 17a. HIMA did not present a life care plan of its own to refute this figure. The District Court instructed the jury that it should consider "... medical and hospital expenses, past and future, including

the ones provided in Fabiola's Life Care Plan." App., *infra*, at 7a, trial tr. 584-85. HIMA did not object to this instruction. Indeed, the respondents' Life Care Plan was submitted to the jury as a joint exhibit, with no objection by HIMA, acknowledging that "[t]hose are the numbers." App. at 8a-9a, trial tr. 595-96. Understandably then, the jury awarded \$1.9 million to Fabiola for future health care costs (of which HIMA is responsible for 47%) as set forth in the unopposed life care plan.

Petitioner also omitted a critical fact regarding the jury's award to Fabiola for loss of income. The evidence of loss of income was testified to by respondents' economic expert, and his report was submitted as an exhibit. HIMA did not present an economic expert of its own. Moreover, during closing arguments, HIMA expressly conceded that, "We are not questioning the loss of potential income, the \$350,534.56." App. at 10a (534 of trial tr.). It was not until after its trial loss that HIMA questioned the award of loss of income (of which it is only responsible for 47%, or \$164,500).

As to the damages awarded for pain and suffering to Fabiola and her parents, again HIMA made no effort to refute the ample evidence that Fabiola suffers from multiple seizures every day and has to endure an exhaustive and painful daily regimen of physical therapy and occupational therapy. The day-in-the-life video demonstrated her daily routine and evidenced her tears and the pain and discomfort she feels throughout. Fabiola's parents testified as to the devastating toll Fabiola's condition has taken on their lives. In addition to the parents' testimony, a psychiatric expert testified as to the enormous emotional impact inflicted on the parents on a daily basis. HIMA presented no experts or

evidence to the contrary. The award to Fabiola's mother is equivalent to less than \$30 per day, and to the father, less than \$15 per day. Fabiola's parents will be enduring this pain and suffering until at least 2048.

Petitioner also omitted critical facts in its discussion of the evidence of negligence and deviations from the standard of care, focusing on Dr. Roldan's acts and glossing over those of the hospital. Uncontroverted evidence showed that the standard of care requires monitoring high-risk deliveries, including induced labor, every 15 minutes. Pet. App. 8a. The hospital had a duty to monitor Marcano's labor while the doctor was not present. Petitioner conveniently omitted discussing the "undisputed" evidence that Nurse Marrero checked the fetal monitor's digital heart rate display at most every 30 minutes, instead of every 15 minutes as per the standard of care. *Id.*

Marcano testified that, after the doctor administered the two drugs, she was alone in the hospital room between 11:45 a.m. and 2:30 p.m. — a period of nearly three hours — experiencing intense contractions and severe pain, and that nurses never responded to her repeated attempts to summon them with the emergency call button. *Id.* This is the period of time that the hospital's negligence in failing to monitor is at issue. "Oddly, the tracing from the fetal heart rate monitor is missing for the period between 10 a.m. and 3:27 p.m., meaning there is no way to evaluate the fetus' heart rate and oxygen supply while Marcano was alone in her hospital room." *Id.* 4a. The tracing was conveniently missing, and now petitioner's brief conveniently omits this critical fact.

There was testimony that this is the first time at HIMA, from 1989 to 2003, that a part of the tracing of a fetal monitor

is missing. HIMA was unable to give any explanation for the missing tracing. *Id.* 7a. Indeed, the evidence established the fact that Nurse Marrero very neatly filled out a record entitled Fetal and Uterine Contractions Reestimates, showing that she allegedly monitored every 30 minutes rather than every 15 minutes as required by the standard of care. Even more egregious, as the First Circuit noted, "Indeed, the jury may have concluded that Nurse Marrero did not even check the fetal heart rate monitor every 30 minutes." *Id.* 8a. This is because of the expert testimony that the "fetal heart rates recorded by Marrero 'are totally out of context not only to the part of the fetal heart rate tracing which we did get an opportunity to evaluate, but of the catastrophic condition of the baby when she was born,' implying that Marrero may have falsified the record." *Id.*

In sum, as the First Circuit concluded,

A reasonable jury could therefore have concluded that Marcano suffered the most intense and frequent contractions beginning shortly after 11:45 a.m., that the missing tracing would reveal that Fabiola was deprived of oxygen during this period, and that negligent monitoring between 11:45 a.m. and Dr. Roldan's return at 2:45 p.m. caused or contributed to Fabiola's injuries.

Id. at 12a. There is no question that if HIMA had properly monitored Marcano's delivery, and alerted the doctor of the fetal distress, such that remedial measures could have been taken, Fabiola would be a healthy five year old today.

REASONS FOR DENYING THE PETITION

Summary of Argument

The petition should be denied because the question presented by petitioner is not truly presented by this case. The lynchpin of petitioner's argument is that Puerto Rico has a substantive standard that is stricter than the federal "grossly excessive" standard, and if applied by the First Circuit, would have resulted in the reduction of the jury award by exactly one-half (such that HIMA would only be responsible for \$1,292,500). Petitioner's argument hinges on the three carefully selected Puerto Rico cases where coincidentally the trial judge's award was reduced by about half, but omits those cases where no such remittitur occurred. On the basis of this alleged Puerto Rico standard, petitioner contends that the First Circuit's decision conflicts with *Erie* and *Gasperini* because it supposedly upholds a larger damage award than would have been permitted in a Puerto Rico court.

There is no conflict between the First Circuit's decision and the decisions of this Court because the First Circuit correctly applied *Erie* and *Gasperini*, and, moreover, then made clear that the damages award comported with the law of Puerto Rico. Looking beyond the three Puerto Rico cases cited by petitioner, which are factually very different from Baby Fabiola's case, Puerto Rico's case law does not establish any mandatory precedent for reducing medical malpractice jury awards by one-half, but rather sets forth a case-by-case determination based on the evidence of each fact specific case. In any event, that issue — whether the award here was, as the Puerto Rico Supreme Court puts it, "exaggeratedly high" — is one of *Puerto Rico* law, which petitioner, try as it might, cannot be allowed to transform into a question of

federal constitutional law. Petitioner has weaved an illusory web of conflict among the circuits, but looking at other case law not cited by petitioner easily untangles the web. In reviewing the Puerto Rico District Court's denial of remittitur, the First Circuit properly applied an abuse of discretion standard. Under that standard, and considering the ample uncontroverted evidence in this case, whether Puerto Rico's "exaggeratedly high" or the federal "grossly excessive" language was applied, the result would have been the same. Any alleged error is harmless. Finally, petitioner's failure to object to jury instructions regarding the numbers in the Life Care Plan, and explicit admissions as to the amount of monetary damages claimed in the Plan and for loss of potential income, has created a waiver of its request for remittitur regarding the award to Fabiola for future care and for loss of income.

I. The Alleged Conflict With *Erie* Rests on Petitioner's Misinterpretation of Puerto Rico Case Law

Petitioner glibly contends that there is a conflict with *Erie* because if the Puerto Rico Supreme Court had reviewed this jury award it would have reduced it by half based on the decision of *Riley v. Rodriguez de Pacheco*, 119 P.R. Dec. 762 (1987). This contention is without basis in law or fact. First, petitioner's three handpicked Puerto Rico cases are either outdated or distinguishable on the facts. Second, and most critically, there are other cases conveniently omitted by petitioner, which clearly provide that since no two cases are exactly alike, no single case, including *Riley*, can be considered binding precedent on another. Third, Puerto Rico's "exaggeratedly high" standard is, as found by the First Circuit, so similar to the federal "grossly excessive" standard that there is no departure, thus no substantive state standard, and thus no possible conflict with *Erie*.

Riley, Nieves and Blas-Toledo Are Readily Distinguished

No matter how it be camouflaged, the petition seeks a result based on interpreting the *Riley* decision to be a substantive standard mandating a *per se* reduction of every award. Petitioner holds up *Riley* as the monetary “benchmark” for all subsequent medical malpractice awards, even if decided almost 20 years later. Pet.’s brief at 13-15. Such is not the case. Even looking only at the three carefully selected cases proffered by petitioner, the First Circuit correctly refused such an interpretation. In short, applying a “ridiculously low or exaggeratedly high” standard to evaluate an award on a case by case basis, based on the evidence and facts of that particular case, is the only policy that can be gleaned from the Puerto Rico Supreme Court cases.

Based on the evidence of damages in *Riley*, the Puerto Rico Supreme Court determined that the trial judge’s award for lost income and mental anguish to the plaintiff mother was reasonably supported. Pet. App. 211a. However, it determined that the award to the plaintiff child was “exaggerated” and reduced the award by approximately one-half. Pet. App. 211a. The facts and evidence in *Riley* are completely distinguishable from the case at bar. The *Riley* plaintiff suffered from “difficulty walking and diminished intellectual capacity.” Pet. brief at 13. The diminished intellectual capacity is slightly below normal. Pet. App. 206a. There was no evidence of a life care plan, or any need for a caregiver, or any expert testimony as to damages. This is not even comparable to the instant case where it is uncontroverted that Baby Fabiola will never see, speak, or walk at all, with absolutely no chance for normal development, and will require a caregiver for the rest of her life. See Stipulated Facts, no. 15, App., *infra*, at 3a. Moreover, as discussed *ante*,

respondents submitted ample evidence of damages, none of which was refuted by petitioner, including the life care plan which was submitted as a joint exhibit, and expert testimony as to loss of income, and mental pain and suffering.

In reaching its decision, the *Riley* Court held, "We try to reach a reasonably balanced award, that is, not extremely low nor disproportionately high." Pet. App. 213a. Applying this standard to the evidence of damages before it, the *Riley* Court determined to only reduce the award to the child, not to the mother. Because two subsequent cases relied on *Riley* to also reduce a medical malpractice award, petitioner urges this Court to conclude that the *Riley* result, *i.e.* the reduction by one-half, is a mandatory precedent which constitutes a substantive standard. Critically absent from petitioner's analysis is any mention of the *Riley* standard, the "extremely low or exaggeratedly high." Instead, petitioner focuses only on the result, and on an alleged "substantive policy of ensuring consistency among medical malpractice awards." Petitioner's brief at 15. Yet nowhere in *Riley* or the other two Puerto Rico cases is any mention made of such policy. Indeed, the word "consistency" is not even mentioned. The petitioner's quest for a uniform rule of reduction demonstrates its misunderstanding of the nature of a court's fact-specific review of a jury award.

Petitioner builds its straw man on three cases of the Puerto Rico Supreme Court, including *Riley*. See *Blas-Toledo v. Hosp. Nuestra Senora de la Guadalupe*, 146 P.R. Dec. 267 (1998); *Nieves-Cruz v. U.P.R.*, 151 P.R. Dec. 150 (2000). We briefly distinguish these two cases before addressing other Puerto Rico cases that refute the alleged standard proposed by petitioner. First, in *Blas Toledo*, the plaintiff child died shortly after the trial, and before the appeal was decided by

the Puerto Rico Supreme Court. The Court actually held that the amount awarded by the trial court to the child for future care was "originally correct," based on the estimated 25 year life span, but solely because of the child's early death, the amount was to be modified accordingly. Petitioner's App. at 118a-120a. The award of special damages to the mother was also upheld, but modified due to the child's early death. *Nieves-Cruz* is easily distinguishable for two reasons: 1) the only plaintiff was the minor child, so the entire \$4 million award was allocated to the child, as opposed to here where the entire \$2.525 million award was divided among three plaintiffs; 2) the \$3.225 million awarded for future care and loss of income was based on an estimated life span of 70 years, which the Court found to be "highly speculative," and thus reduced it accordingly. *Id.* at 53a. In contrast, in the instant action the estimated life span of 35-45 years was not speculative, but rather, was based on an expert neurologist's report, and stipulated to by petitioner HIMA. App. at 4a-5a.

*Other Puerto Rico Cases Make it Clear that
Riley is No Benchmark*

A mere cursory glance at other Puerto Rico cases further reveals the vulnerability of petitioner's straw man. In 1997, ten years after *Riley*, the Puerto Rico Supreme Court decided *Toro Aponte v. E.L.A.*, 142 P.R. Dec. 464 (1997), a medical malpractice case in which the Court refused to reduce the trial judge's award. App., *infra*, at 11a-45a. At the outset the *Toro Aponte* court, citing *Riley*, sets forth the applicable standard of review: "we will only intervene in the amount awarded, if it is exaggeratedly high or ridiculously low." App. at 27a. And then, in language that directly undermines petitioner's Don Quijote-like quest for a uniform rule, the *Toro Aponte* Court stated:

Recall that “*there are no two cases exactly the same*; each case can be distinguished by its own and varied circumstances. That is why that . . . the decision rendered in a specific case in relation to this subject, *cannot be considered a mandatory precedent for another case*”.

Id. at 478 (emphasis supplied), quoting *Rodriguez Cancel v. A.E.E.*, 116 P.R. Dec. 443, 451 (1985). App. at 27a.

In *Toro Aponte*, evidence of the pain and suffering endured by the mother who underwent a cesarean section where the doctor negligently left a surgical tool inside, and the severe organ damage that resulted, as well as the spouse’s emotional pain and suffering, convinced the Puerto Rico Supreme Court that a remittitur was not warranted. Significantly, the Court also noted that a comparative review of case law proffered by the defendant did not persuade it to modify the award. App. at 22a.

The *Toro Aponte* decision alone is sufficient to poke a hole in petitioner’s three case strawman. But there is more. In *Elba A.B.M. v. U.P.R.*, 125 P.R. Dec. 294, 327 (1990), decided three years after the “*Riley* benchmark,” the Puerto Rico Supreme Court denied a request for remittitur, applying the “exaggeratedly high” standard. The Court quoted the same language from *Toro Aponte*, and *Rodriguez Cancel*, *ante*, as to how no two cases are alike, and no one case can be considered mandatory precedent. *Id.* Four years after *Riley*, the Puerto Rico Supreme Court again addressed a request for remittitur in a medical malpractice case, and decided, based on the evidence, not only to deny remittitur, but to increase the award. *Velazquez Ortiz v. U.P.R.*, 128 P.R. Dec. 234, 236 (1991) (*per curiam*). In *Velazquez Ortiz*, the Court

used the exaggeratedly high standard, and also relied on the *Toro Apontel Rodriguez Cancel* language, *ante*.

In *Quiñones Lopez v. Manzano Pozas*, 141 P.R. Dec. 139, 179 (1996), decided nine years after the “*Riley* benchmark,” the Supreme Court of Puerto Rico rejected a request for remittitur based on an analogous case. The Court relied on the *Toro Apontel Rodriguez Cancel* language, no two cases are exactly alike, and no case can be a mandatory precedent, in refusing to reduce the award based on a comparatively lower award in an analogous case. *Id.* And finally, in *Agosto Vazquez v. Woolworth & Co.*, 143 P.R. Dec. 76, 81 (1997) (*per curiam*), decided ten years after *Riley*, the Puerto Rico Supreme Court applied the exaggeratedly high standard in rejecting a request for remittitur. This decision also relies on the “no two cases are alike” language of *Toro Apontel Rodriguez Cancel*. *Id.*

Thus, petitioner’s glib conclusion that there is a conflict with *Erie* because the Puerto Rico Supreme Court would have compared the instant \$2.525 million verdict to the *Riley* “benchmark,” and then reduced the verdict by half, is sheer speculation, not supported by Puerto Rico precedent. In light of the above case law, the isolated cases of *Blas Toledo* and *Nieves Cruz* do not support petitioner’s argument that the monetary award in *Riley* is mandatory precedent. The Puerto Rico Supreme Court policy is merely that it should only intervene in a trial judge’s award if it is “ridiculously low or exaggeratedly high,” based on the facts and evidence of that particular case. *See, e.g., Toro Aponte*, 142 P.R. Dec. 464. By no stretch can this policy be interpreted as petitioner urges — that “the Puerto Rico Supreme Court has employed a comparative excessive damages standard that *requires* medical malpractice awards to conform to prior awards in Puerto Rico courts.” Pet. Brief at 17 (emphasis supplied).

Petitioner's assertion that this petition presents a conflict with *Erie* is without merit. There is no conflict with *Erie*, there is only a conflict between petitioner's speculative and incorrect interpretation of Puerto Rico policy, and the policy as unambiguously stated by the Puerto Rico Supreme Court.

II. The First Circuit's Decision Does Not Conflict With *Erie* or *Gasperini*, Because the Federal and State Standards are the Same

As stated in the First Circuit decision below, under this Court's holding in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 431 (1996), federal courts sitting in diversity must apply state substantive standards in reviewing jury awards. Pet. App. 15a. This Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), controls whether the state standard is substantive or procedural. In *Gasperini*, a New York state statute codified a new "deviates materially" standard of review, replacing the former "shock the conscience" standard previously used in New York state courts. The First Circuit found notable *Gasperini's* emphasis that the "deviates materially" standard was more "rigorous" than its federal counterpart, the "shock the conscience" standard, and that it had a "manifestly substantive" objective. Pet. App. 17a, citing *Gasperini*, 518 U.S. at 429. Applying *Erie*, this Court determined that the New York statute was both substantive and procedural. *Id.* at 426. The Court noted that if the New York statute had merely placed a cap on damages it would readily have been considered a substantive standard. However, although the New York statute was "less readily classified, it was designed to provide an analogous control." *Id.* at 429. Accordingly, this Court concluded that the rigorous "deviates materially" language constituted a substantive standard, even though the assignation of decision-

making authority to the appellate courts to engage in comparative evaluations was procedural. *Id.*

The First Circuit properly engaged in the same *Gasperini/Erie* analysis in order to determine whether the Puerto Rico Supreme Court had “adopted a more rigorous standard of review for medical malpractice damages that is tantamount to a substantive rule of law that must be applied in diversity cases.” Pet. App. 17a. Looking at the same three cases proffered by petitioner herein, the First Circuit considered the “ridiculously low or exaggeratedly high” language used by the Puerto Rico Supreme Court, and determined that it echoes the federal “grossly excessive” standard. *Id.* at 16a. Notably, although petitioner characterizes as “superficial” the First Circuit’s determination that the Puerto Rico standard echoes the federal standard, petitioner fails to identify any difference between the two standards. Pet. Brief at 21. The First Circuit concluded that Puerto Rico case law does not suggest a departure from the federal standards for judging excessiveness, and thus does not provide a substantive rule of law that must be applied in diversity cases. *Id.* at 17a.

It is this conclusion with which petitioner finds fault, however this does not by any means, constitute a conflict with *Erie* or *Gasperini*. *Gasperini* did not hold that every state standard must be applied in diversity cases, but rather that only substantive state standards would be applicable. Otherwise, the principles espoused in *Erie* would be meaningless. Petitioner feebly attempts to cast this as a source of confusion, see petitioner’s brief at 8, but nothing could be more straightforward. The First Circuit properly conducted an *Erie* analysis as per the mandates of *Gasperini* – it is the First Circuit’s application of the law to the facts that is petitioner’s real issue here, not the illusory conflict.

The bottom line is that petitioner has failed to demonstrate any rationale or basis for determining that Puerto Rico's "exaggeratedly high" standard is any stricter than the federal "grossly excessive" standard. Petitioner's attempt to characterize Puerto Rico policy as requiring strict conformity with prior awards has already been shown, *ante*, to be without merit. Petitioner relied on this characterization in order to create a similarity with the New York statute in *Gasperini*, but it is unavailing. Even if it were so, it is that comparative undertaking that was determined by this Court to be the procedural component, whereas the substantive component was the statute's stricter "deviates materially" standard. This stricter standard is simply not present in the Puerto Rico cases, and thus the First Circuit properly determined that there was no departure from the federal standard. Again, this does not present an issue of conflict, but rather a misinterpretation by petitioner of Puerto Rico authority.

III. Petitioner's Web of Conflict Among the Circuits is Illusory

Petitioner attempts to weave a web of conflict among the circuits as a last-ditch attempt to attract this Court's attention. On closer look, however, this web easily untangles. Again, petitioner has handpicked a few isolated cases to support its argument that there is a split in the circuits. Presumably the Sixth, Seventh and Ninth Circuits apply the federal excessiveness standard without engaging in any *Erie* analysis or even referencing *Gasperini*, whereas the Eighth and Tenth Circuits always apply the state standard, even if it is the same as the federal standard. Pet. brief at 17-23.

Defeating petitioner's premise regarding the first group, in 2002 the Seventh Circuit expressly held, in accordance

with *Gasperini*, that the substantive law of the state determines whether a damages award is adequately supported by the evidence. *Jabat, Inc. v. Smith*, 201 F.3d 852, 857 (7th Cir. 2002). See also *Houben v. Telular Corp.*, 309 F.3d 1028, 1034-36 (7th Cir. 2002) (fully discussing *Gasperini*); *Jutzi-Johnson v. United States*, 263 F.3d 753 (7th Cir. 2001) (discussing *Gasperini*). Moreover, the single Seventh Circuit case cited by petitioner applies the federal excessiveness standard, but it is interchangeable with the state "shocks the conscience" standard. *Kapelanski v. Johnson*, 390 F.3d 525 (7th Cir. 2004). In *Galam v. Carmel* (In re Larry's Apt., L.L.C.), 249 F.3d 832, 837 (9th Cir. 2001), the Ninth Circuit held that a federal court sitting in diversity applies state substantive law regarding attorney's fees. In *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003), a diversity case, the Ninth Circuit cited *Gasperini* and applied substantive state law in reviewing the district court's award of damages. Similarly, the Sixth Circuit has repeatedly referenced *Gasperini* and held that in diversity cases substantive state law is applicable to determine whether an award of damages is excessive. See, e.g., *Lewis v. Quaker Chem. Corp.*, 2000 U.S. App. LEXIS 22321 (6th Cir. 2000); *David v. Ana TV Network, Inc.*, 2000 U.S. App. LEXIS 2477, *19 (6th Cir. 2000); *Tatum by Tatum v. Land*, 1997 U.S. App. LEXIS 3798 (6th Cir. 1997). Thus, looking beyond petitioner's handpicked cases demonstrates that the Sixth, Seventh and Ninth Circuits are correctly applying *Gasperini*.

Petitioner also attempts to colour the Eighth and Tenth Circuit's application of *Gasperini* to create a conflict with the other Circuits. But even as set forth in petitioner's brief, these Circuits are correctly interpreting *Gasperini* to require the application of "state substantive law" in determining whether an award is excessive. Pet. brief at 19. Petitioner

makes much ado about the fact that the state standard is the same as the federal standard, and the Circuit Court nevertheless applied the state standard. This is a difference without a distinction, because the result would have been the same whether the Circuit Court applied the state or federal standard, and thus *Erie* is not even implicated. In sum, there is no conflict among the Circuit courts.

For the same reason, even if the District Court of Puerto Rico had erred by determining that the federal rather than the state standard should apply, any error is harmless. Considering the ample and uncontroverted evidence in this case, and the similarity between the "grossly excessive" and "exaggeratedly high" standards, applying either standard would have resulted in the same determination that the award was by no means excessive. This is particularly true considering that the First Circuit properly applied, as per *Gasperini*, an abuse of discretion standard to review the District Court of Puerto Rico's denial of remittitur. Pet. App. 17a. See also, *Gasperini*, 518 U.S. at 438-39.

IV. Petitioner Has Waived Its Right to Request Remittitur Regarding the Awards for Future Care and Loss of Potential Income

As fully set forth in respondent's Statement, ante, petitioner has waived its right to request remittitur regarding the award to Baby Fabiola for future care and for loss of potential income, since at trial it stipulated to, expressly conceded, and/or failed to refute the precise monetary damages asserted. To briefly recap: 1) HIMA expressly stipulated to Baby Fabiola's prognosis and her 35-45 year life span; 2) the respondents' expert's Life Care Plan was submitted as a joint exhibit, and when the District Judge

instructed the jury to consider those numbers provided in the Plan in determining past and future expenses HIMA did not object; 3) not only did HIMA fail to object it stated for the record that it had no problem submitting the Plan to the jury because “those are the numbers” (\$1.9 million); and 4) during closing arguments HIMA stated that it was “not questioning the loss of potential income, the \$350,534.56.”

It is axiomatic that a party’s stipulations are binding on that party and may not be contradicted by him at trial or on appeal. *See, e.g., Feliciano v. Rullan*, 303 F.3d 1, 8 (1st Cir. 2002); *Keller v. United States*, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995). A stipulation or “the withdrawal of an objection is tantamount to a waiver of an issue for appeal.” *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1108-09 (9th Cir. 2001). “When parties do not object to jury instructions, these instructions generally become the law of the case.” *Geldermann, Inc. v. Financial Management Consultants, Inc.*, 27 F.3d 307, 312 (7th Cir. 1994). In light of petitioner’s stipulations, direct concessions which amount to stipulations, and failure to object, its argument that the award to Fabiola for future care, or for loss of potential income, is excessive, is expressly waived, and should not be considered by this Court.

CONCLUSION

The writ of certiorari should not issue. There is no conflict between the decision below and this Court's decision in *Erie* or *Gasperini*. There is no conflict among the Circuit Courts since any one of them would have applied the same test and reached the same conclusion as the First Circuit did in this case.

Respectfully submitted,

CARLOS A. RUIZ
P.O. Box 12980
Caguas, P.R. 00726-01298
(787) 286-8775

JORGE M. SURO-BALLESTER
Counsel of Record
1225 Ponce de León Ave., PH-2
San Juan, P.R. 00907-3921
(787) 724-5522

Counsel for Respondents

January 3, 2006

APPENDIX

1a

**APPENDIX A — STIPULATED FACTS FILED IN
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF PUERTO RICO
ON SEPTEMBER 9, 2003**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

CIVIL NO. 02-1068 (HL)

MARIA YOLANDA MARCANO RIVERA, et al.,

Plaintiffs,

v.

DR. PEDRO ROLDAN MILLAN, et al.,

Defendants

STIPULATED FACTS

**TO THE HONORABLE HECTOR M. LAFFITTE
UNITED STATES DISTRICT COURT JUDGE:**

COME NOW, the parties, through their respective legal counsel and, respectfully submit the following Stipulations of Facts:

1. Defendant Turabo Medical Center Partnership (TMCP) is a Delaware partnership having its principal place of business in Caguas, Puerto Rico. As September 14, 2000, TMCP was the owner and operator of the Hospital Interamericano de Medicina Avanzada in Caguas, Puerto

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Rico, hereinafter, HIMA. TMCP ceased its existence on December 31, 2002 and Centro Medico Del Turabo, Inc. became the successor to TMCP, assuming all of its assets and liabilities.

2. As of September 14, 2000, Dr. Pedro Roldán Millan was an obstetrician gynecologist with 33 years of experience.

3. Dr. Roldan was not employed by HIMA. Dr. Roldan enjoyed privileges at HIMA from 1988-2001.

4. Upon Mrs. Marcano's admission to HIMA on September 14, 2000, HIMA obtained a consent from Mrs. Marcano authorizing the use of the procedures and medications that her lead physician Dr. Pedro Roldan deemed necessary, and a consent for surgery also authorizing the procedures (labor/cesarean procedure) that her lead physician deemed necessary.

5. Upon Mrs. Marcano's admission to the hospital on Dr. Roldan's orders, Mrs. Marcano was placed in Room 206, which is the room right across the nurses counter.

6. Mrs. Marcano was connected to an electronic fetal monitor on or about 10:00 a.m. upon her admission to HIMA.

7. The fetal monitor to which plaintiff Maria Yolanda Rivera Marcano was connected is a Corometrics Model 115.

8. The Corometrics 115 fetal monitor comes equipped with a strip-chart recorder that records and prints in paper the fetal heart rate and the uterine contractions. The document

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where these are printed is known as a flow chart or tracing. The monitor also has a digital screen that displays the fetal heart rate as it is registered.

9. The flow chart or tracing of the fetal heart rate of Fabiola and of the uterine contractions of Maria Yolanda Marcano Rivera from 10:00 a.m. to 3:27 p.m. is missing.

10. Maria Yolanda Marcano Rivera was disconnected from the fetal monitor between 5:30 and 6:00 p.m. before transferring her to the delivery room. There is no tracing or flowchart after Maria Yolanda Marcano Rivera was disconnected from the fetal monitor.

11. Baby Fabiola Rodriguez Marcano was born on September 14, 2000, at 6:19 p.m., at HIMA.

12. Dr. Antonio R. González Santos is a pediatric neurologist who at the time of Fabiola's birth had privileges to practice at HIMA. On September 15, 2000, he answered a consultation from the HIMA's Neonatal Group concerning Fabiola's condition at birth. His diagnosis was "newborn asphyxia".

13. On September 24, 2000, Dr. Irma Morales, a pediatrician who had privileges at HIMA, answered a consultation from the Neonatal Group concerning Fabiola's condition at birth. Her diagnoses were neonatal depression, neonatal asphyxia and seizures probably secondary to neonatal asphyxia.

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14. On October 2, 2000, Dr. Edgardo Jiménez, from the Neonatal Group, made the following diagnoses concerning Fabiola, neonatal depression, perinatal asphyxia, neonatal seizures, anoxic encephalopathy, mechanical ventilation.

15. Fabiola's prognosis is grim with absolutely no chance for normal development. She will never be ambulatory nor will she ever see or communicate, and will require a caregiver for the rest of her life.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 9th day of September 2003.

s/ Jorge Miguel Suro Ballester, Esq.
JORGE MIGUEL SURO BALLESTER, ESQ.

s/ Orlando H. Martinez Echeverria, Esq.
ORLANDO H. MARTINEZ ECHEVERRIA, ESQ.

s/ Fernando E. Agrait, Esq.
FERNANDO E. AGRAIT, ESQ.

**APPENDIX B — EXCERPTS OF TRANSCRIPT OF
PROCEEDINGS DATED OCTOBER 15, 2003**

[commencing at page 227]

Afternoon Session

(In open court, jury not present:)

MR. SURO-BALLESTER: Your Honor, there are two housekeeping matters, one of them being, we came to a stipulation yesterday afternoon that it would not be necessary for the Plaintiffs to call Dr. Jose Carlo, a neurologist, to give his opinion as to the life expectancy of Fabiola. We have agreed that the life expectancy of Fabiola is as indicated in Dr. Carlo's report, from 35 to 45 years of age.

We somehow need to explain that to the jury that during my opening statement, the preliminary instructions, it was mentioned Dr. Carlo would be one of the witnesses involved in this case.

THE COURT: You mean your opening statement, because I didn't say that. You said preliminary instructions.

MR. SURO-BALLESTER: In the voir [228] dire, these are the witnesses.

THE COURT: Fine.

MR. SURO-BALLESTER: And the testimony of Dr. Carlos Rodriguez, the economist, our next witness, one of the bases for that testimony is precisely the life expectancy.

Appendix B

THE COURT: Fine. You say it has been stipulated that Baby Fabiola will have a life expectancy of so many years. That's it.

* * * *

**APPENDIX C — EXCERPTS OF TRANSCRIPT OF
PROCEEDINGS DATED OCTOBER 20, 2003**

[commencing at page 584]

* * *

You should consider the following items for elements of damages to the extent you find them proved by a [585] preponderance of the evidence:

A, medical and hospital expenses, past and future, including the ones provided in Fabiola's life care plan.

B, Plaintiff Fabiola's physical pain and anguish.

C, Plaintiff Fabiola's potential loss of income.

D, Fabiola's parents' pain and suffering; Fabiola's parents' capacity to enjoy life.

* * * *

**APPENDIX D — EXCERPTS OF TRANSCRIPT OF
PROCEEDINGS DATED OCTOBER 20, 2003**

[commencing at page 595]

* * *

(In open court, jury not present:)

THE COURT: I just received a message from the jury, and they have requested the Court the following: Please provide the following, one calculator, which I'm going to submit to them, a copy of Dr. Woodrich economic projections of life care plan, [596] loss of income, et cetera.

MR. SURO-BALLESTER: Dr. Woodrich's report, if I'm not mistaken, was not submitted into evidence. What was submitted into evidence, which are Exhibits 10 and 10-A, are the reports of Dr. Carlos Rodriguez.

THE COURT: They're not asking for that.

MR. AGRAIT-BETANCOURT: Your Honor, I understand that the only reason Dr. Woodrich's report was not submitted into evidence was because his testimony was the same as the report. In terms of the Defendant, we have no problem.

THE COURT: To submit the report.

MR. AGRAIT-BETANCOURT: Those are the numbers.

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THE COURT: Let's have that marked as joint exhibit
— where is it?

THE CLERK: It will be Joint Exhibit Number 7, Your
Honor.

* * * *

**APPENDIX E -- EXCERPTS OF TRANSCRIPT OF
PROCEEDINGS DATED OCTOBER 20, 2003**

[commencing at page 534]

* * *

We are not questioning the loss of potential income, the \$350,534.56. We do not question the reality of serious personal damages. We are convinced by the same evidence that you heard and received that it was Dr. Roldan's responsibility.

* * * *

**APPENDIX F — OPINION OF THE SUPREME
COURT OF PUERTO RICO DECIDED
JANUARY 31, 1997**

IN THE SUPREME COURT OF PUERTO RICO

Number: RE-90-560

NANCY TORO APONTE / MANUEL ALVAREZ,

Plaintiffs-Appellees,

v.

COMMONWEALTH OF PUERTO RICO ET ALS ,

Defendants-Appellants.

Decided: January 31st, 1997

JUDGE PRESIDING MISTER ANDREU-GARCIA Issued the opinion
of the Court.

The (medical) profession is one of those which most risks entails, both for he who exercises same, as well as he who receives same. This is basically due to the object itself of this very profession: human beings, which becomes subject to medical situations in several of the most important aspects of their personality, and health in particular. (Note omitted). J. Fernandez Costales, Hospital and Medical Civil Liability, Madrid, Edilex Editors, 1987, page 3.

Physicians Jorge Carlo Font and Jose Cruz Santiago, do not request that we revoke sentence by the extinct Superior

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Court, Mayaguez Part (Hon. Angel M. Almodovar Correa, Judge), which ordered they disburse one hundred and twelve thousand five hundred dollars (\$112,500.00) compensation for torts resulting from a surgical procedure to which plaintiff Nancy Toro Aponte was subjected to. Said amount is equivalent to seventy five percent (75%) of the total sum of one hundred and fifty thousand (\$150,00.00) dollars, which the trial court granted to plaintiffs, for damages suffered as result of carelessness during surgery, which resulted in leaving behind a surgical gauze within the abdomen of Mrs. Toro Aponte. The remaining thirty seven thousand five hundred dollars (\$37,500.00), equivalent to twenty five percent (25%) of liability befell upon the Commonwealth (henceforth E.L.A.), owner of the hospital where Plaintiff had her surgery, and employer of all other persons who participated in such surgery.

Through a writ of appeal before us, they have indicated commission of the following errors by the trial court: (1) that compensation granted was excessive; (2) that certain expressions were mistakenly interpreted as admission of liability, and (3) that E.L.A. should have been liable for the totality of damages, since it was the employer of the direct precipitator of such damages.

We issue this writ, upon request of plaintiffs. Confirmation is appropriate.

I

This anguishing drama began when youth Nancy Toro Aponte, in late 1987, became pregnant by Luis Manuel Alvarez Velez with whom she had lived as concubine. To deal with her pregnancy, Mrs. Toro-Aponte visited the joint offices of physicians Salvador Rovira Martino, Jorge Carlo Font and Jose D. Cruz Santiago, who attended her during her pregnancy period.

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On June 29th of 1988, having thirty seven weeks elapsed, Dr. Cruz Santiago referred her over to the Mayaguez Medical Center. She was there admitted to the Gynecology and Obstetrics Department of the Hospital. Management and administration of said department had been subcontracted to the *Centro Ginecobstetrico* a civilian partnership composed of physicians Cruz-Santiago, Rovira-Martino and Carlo Font. Around midnight, Dr. Carlo Font, physician on duty in charge of the Delivery Room, informed Mrs. Toro Aponte that her delivery needed to be by cesarean¹ which he performed during early hours.

Under apparent recovery, Mrs. Toro Aponte was discharged from the Medical Center, two (2) days after

1. Cesarean is defined as "surgical procedure extracting a fetus through the abdominal wall . . ." Teide Medical Dictionary, Barcelona, Ed. Teide, 1988, p. 103. Accompanying her at the surgery room were anesthesiologist Ernesto Santini, Dr. Laura Rios², rotating nurse Norma Arroyo and operating room Technician Jaime Ortiz.³ Dr. Carlo Font successfully performed the delivery, a baby girl and, prior to closing the wound, requested counting of instruments and gauzes utilized. Nurse Arroyo assured that all surgical instruments were outside of the patient's body and she so acknowledged it through certification in the surgical record. Trusting said nurse's count, the physician then proceed to close the wound.

2. According to testimony from Dr. Jorge Carlo Font at hearing in full, During said surgery, Dr. Laura Rios suffered faint headedness, and had to Prematurely absent herself from the room. Narrative discourse of Oral Testimony. (henceforth ENP), page 14.

3. Duties of the room technician, also known as instrumentationist or scrub nurse, is to assist in counting surgical instruments, and to organize the materials tray. ENP, pages 13 and 15.

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surgery, and returned home. After eight (8) days elapsed subsequent to delivery, Mrs. Aponte visited Dr. Cruz Santiago at his office, to have the surgical sutures removed. She then informed the physician that she had been feeling severe abdominal pains ever since her surgery. Doctor Cruz Santiago assumed that her discomfort was due to surgical trauma, and prescribed analgesics. After three (3) weeks, the medications had not evidenced any effect, the pain had become "unbearable", and begun to suffer from diarrhea, according to said aggrieved party's testimony. Narrative discourse of Oral Testimony (henceforth, ENP), page 3. Things being such, she again went over to her physicians offices. Dr. Cruz Santiago again proceeded to examine her through a vaginal examination, and noticed that the womb of Mrs. Toro Aponte was swollen. Even so, said physician did not consider it necessary to have x-rays or a sonogram done on her.

Dissatisfied, Mrs. Toro Aponte then decided to obtain a second opinion. She went over to the office of Dr. Elena Arroyo, a specialist in female diseases. Dr. Arroyo suspected that something was wrong, since pains relating to cesarean surgeries tend to disappear within less than two (2) weeks. Upon examining her, she felt a mass within her abdominal area, and instructed her to swiftly get a sonogram and consult her gynecologist or some other specialist, if she so preferred. Mrs. Toro Aponte had her sonogram done, as indicated, and once again returned to the offices of defendant physicians.

On this occasion she was seen by her surgeon, Doctor Carlo Font who, dissatisfied with the sonogram that Mrs. Toro had obtained, requested she take another one done. By this time she had lost all faith and trust in her physicians,

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thus, instead of following the recommendations of Dr. Carlo Font, she chose to see another physician. Consequently, on August 26th she visited Dr. Hector Casanova. Although said physician prescribed intravenous antibiotics, her condition did not improve much during that week-end. The following Monday, she woke up vomiting, with diarrhea and an unbearable pain. That very same day, Dr. Casanova ordered x-rays and a sonogram be urgently taken at the Perea Clinic in Mayaguez. The x-ray revealed the presence of a foreign body within the abdominal area, wherefore the physician immediately proceeded to have exploratory surgery performed on her.

Doctor Casanova and surgeon Pedro E. Perez Perez discovered, within the Abdominal cavity of Mrs. Toro Aponte, a surgical gauze which measured 43 cm. in length by 40 cm. in width, adhered to the lower portion of her small intestine (ileum), at the point in which same ends towards the colon.⁴ The infection was of such a magnitude, that upon removing said gauze, the walls of the large intestine were perforated. Moreover, she had developed peritonitis and extensive swelling of the adjoining tissues. Doctor Perez had to perform a partial re-insertion of the intestine of about approximately five (5) to six (6) inches in length,⁵ and reattach the small intestine to her colon, through a

4. The colon is defined as "the main portion of the large intestine . . . (which) does not have a digestive function, but absorbs huge quantities of water and electrolytes from non-digested foods arriving from the small intestine. Intense peristaltic movements which are produced at given intervals, move the dehydrated content (feces), toward the rectum". Teide Medical Dictionary, quoted text, page 127.

5. Resection is defined as "extraction of a portion or organ from bone extremities or (from) other tissues." Diccionario Terminológico

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sutured attachment (anastomosis). A colostomy was performed, so that said anastomosis could properly scar,⁶ inasmuch that she could defecate through an incision in her abdomen. Mrs. Toro Aponte had to defecate through a bag during ten (10) months and, subsequently, was subjected to another surgery, to close-up said colostomy.

As a result of such events, Mrs. Toro Aponte and her partner Luis Manuel Alvarez Velez sued the physician partners of Centro Ginecobstétrico, doctors Carlo Font, Cruz Santiago and Rovira Martino;⁷, their respective community

(Cont'd)

de Ciencias Medicas, (Medical Sciences Terminological Dictionary), 1th Ed., Barcelona, Salvat Editores, 1984, page 240.

Dr. Pedro E. Perez-Perez stated at the hearing that re-sectioning of the small intestine measured close to ten (10) centimeters on each side, equivalent to barely less than eight (8) inches, ENP, page 10.

6. Colostomy is a "surgical procedure through which a portion of the colon is opened on to the abdominal wall, allowing for drainage or decompression of the intestine, through the artificial opening . . . Generally, a bag is attached to the opening for said colostomy . . . to pick-up the feces . . ." Teide Medical Dictionary, quoted text, page 129.

7. Doctors Cruz Santiago, Carlo Font and Rovira Martino filed a third Party complaint against the Commonwealth of Puerto Rico (henceforth, E.L.A.), alleging that if any negligent omission was committed, same had to be attributed to Medical Center employees, in which case the State would have become liable to plaintiffs. They requested that, if any joint liability with E.L.A. were imposed upon them, that the State be ordered to reimburse them for whatever they were to disburse.

(Cont'd)

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properties; Dr. Laura Rios⁸ and her community partnership; the Commonwealth of Puerto Rico⁹, plus two (2) defendants of unknown identity, claiming damages for negligence. In their judicial claim Mrs. Toro Aponte and Mr. Alvarez Velez alleged that the carelessness of having left the gauze inside plaintiff's body caused her severe damage both physically as well as mentally. Plaintiffs alleged that, in to medical mishaps and the physical and emotional pain which such damages prompted, their intimate relationships became affected because of said colostomy¹⁰, and that this affected

(Cont'd)

The State counter-sued Centro Ginecobstétrico physicians and alleged that they were in charge of managing the Obstetrics and Gynecology Department at the Mayaguez Medical Center, and of supervising medical personnel, thus, they would be vicariously liable. It further requested that said physicians reimburse any sums that it be forced to pay Plaintiffs.

Cause of action filed against Dr. Salvador Rovira Martino was dismissed by Partial Sentence on December 7th of 1989, grounded on that his intervention with the aggrieved party was limited to her pre-natal stage, that is, before any damages took place.

8. Through Partial Sentence dated July 20th of 1989, the Trial Court dismissed claims against Dr. Laura Rios, since she was covered by the immunity that is extended to State employees through Article 41.050 of the Insurance Code, 26 L.P.R.A. Sect. 4105.

9. Moreover, the Justice and Health Departments, as well as the Puerto Rico Medical Center, were included as defendants.

10. According to testimony by Plaintiffs, the attachment was so discomforting and unpleasant, that it hindered her from sustaining intimate relations.

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their respective duties within the household. They claimed the sum of two million (\$2,000,000.00) dollars in compensation for torts, and ten thousand (\$10,000.00) in attorney fees plus costs.

After a full hearing was held on June 18th of 1990, the Court ruled sentence in favor of Plaintiffs, condemning E.L.A. and doctors Cruz-Santiago and Carlo Font for co-joint payment of one hundred and forty thousand (\$140,000.00) Dollars for damages caused upon Mrs. Toro Aponte, plus ten thousand dollars (\$10,000.00) for damages suffered by Mr. Alvarez Velez.¹¹ In its sentence, the sentencing forum imposed an equal level of liability upon defendants, for sole purposes relating to the internal amongst causing said damage. Subsequently it accepted a motion for reconsideration and through a ruling modified levels of liability for the physicians, increasing same to seventy five percent (75%).

Drs. Cruz Santiago and Carlo Font appeal said sentence and the ruling which modified same. Let us examine all three (3) indications of error under which they ground themselves to request that we revoke the Court's rulings. Since we deem it to be appropriate, we shall first discuss the last indication of error.

11. In Puerto Rico the principle of co-joining of liability between co-causation of damages towards an aggrieved party, controls. *Sanchez Rodriguez v. Lopez Jimenez*, 118 D.P.R. 701 (1987). Furthermore, see *Ramos v. Caparra Dairy, Inc.*, 116 D.P.R. 60 (1985).

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II

Appellants allege that the Trial Court erred by assigning them the greater level of liability for such negligence. They sustain that E.L.A. (Commonwealth) must bear the totality or the greater part of liability, since it was the employer of Nurse Arroyo, the direct precipitator of such damages.

(1) Within our jurisdiction, civil liability which derives from culpable or negligent acts or omissions, is governed by provisions of Article 1802 of our Civil Code, 31 L.P.R.A. Sect. 5141.¹² *J.A.D.M. v. Centro Comercial Plaza Carolina*, 132 D.P.R. 785 (1993); *Elba A.B.M. v. U.P.R.*, 125 D.P.R. 294 (1990); *Valle v. AMER. Int. Ins. Co.*, 108 D.P.R. 692 (1979); *Gierbolini v. Employers Fire Ins. Co.*, 104 D.P.R. 853 (1976). For civil liability to exist under the quoted article, it becomes necessary that the following events occur: a damage, a negligent act or omission, and a pertinent causal relationship between said damage and the negligent or culpable conduct. *Ramirez v. E.L.A.*, 140 D.P.R. 385 (1996); *Tormos Arroyo v. D.I. P.*, 140 D.P.R. 265 (1996); *Monllor v. Soc. de Gananciales*, 138 D.P.R. 600 (1995).

(2)(3) The concept of "guilt" of Article 1802, is as comprehensive and ample, as human conduct itself is.

12. Said article provides:

"Whomever through action or omission causes damages to another, through intervening negligence or culpability, become obligated to repair such damaged caused therein. Concurring imprudence of the aggrieved party does not exempt liability but, entails a reduction of indemnity." 31 L.P.R.A. Sect. 5141.

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Reyes v. Sucn. Sanchez Soto, 98 D.P.R. 305, 310 (1970). Negligence or culpability is the lack of due care which, in turn, consists in not anticipating or foreseeing the rational consequences of any act or omission of any action that any prudent person would have foreseen under identical circumstances. *Ramos v. Carlo*, 85 D.P.R. 353, 358 (1962). The need for orderly social co-existence imposes a general duty of correction and prudence, as it relates to others citizens, and such action is unlawful in an extra-contractual sense whenever same breaches general duties as to proper conduct or correction, duties which are not drafted within codes but which represent the minimal understood assumption about social order. *Ramos v. Carlo, supra*.

(4) "Guilt consists in omission of due diligence, use of which could have avoided any damaging results." C. Rogel Vide, *Extra-Contractual Civil Liability*, Ed. Civitas, 1976, page 90. Due diligence is that which is expected from the average human being, a good *Pater Familias*. If a damage is foreseeable by him, liability exists. If same were not foreseeable, we would, in general, have a fortuitous case. *Jimenez v. Pelegrina Espinet*, 122 D.P.R. 700, 704 (1982). In the past, and quoting Manresa, we have affirmed that negligence and culpability are two sides of the same coin, since "culpability requires execution of a positive action which causes damage to another person distinct than he who executes same, and negligence, in turn, assumes an omission which produces such identical effect, although both bear in common that such action is executed or such omission incurred into, without any noxious intent . . . 12 Manresa, *Comments to the Spanish Civil Code* (Comentarios al Código Civil Español) 6th Edition, 1973 page 837". *Gierbolini v. Employers Fire Ins. Co., supra*, page 857.

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(5) The following elements are taken into consideration, to decide whether an omission has prompted liability: (1) existence or non-existence of juridical duty to act, by the alleged one causing such damage, non-compliance of which prompts such anti-juridical action and (2) if the omitted action had been undertaken, such damage would have been avoided. *Tormos Arroyo v. D.I.P.*, *supra*, *Arroyo Lopez v. E.L.A.*, 126 D.P.R. 682 (1990); *Soc. Gananciales v. G. Padin Co. Inc.*, 117 D.P.R. 94 (1986).

(6) Last, we reaffirm that within our system governs the theory of adequate causality. According to this "not every condition without which a (damage) could have been produced is a cause, rather, what ordinarily produces same, according to general experience". J. Santos Briz, *Derecho de Daños* (Torts Law), Madrid, Ed. Rev. Der. Privado, 1963, page 215. See: *Soto Cabral v. E.L.A.*, 138 D.P.R. 298 (1995); *Miranda v. E.L.A.*, 137 D.P.R. 700 (1994); *Jiménez v. Peregrina Espinet*, *supra*; *Sociedad de Gananciales v. Jeronimo Corp.*, 103 D.P.R. 127, 134 (1974). Therefore, then "(a) damage seems to be the natural and probable result of a negligent act if, after the event, and observing such alleged negligent act retroactively, such damage appears as the reasonable and ordinary result of such act". *Torres Trumbull v. Pesquera*, 97 D.P.R. 338, 343-344 (1969). Having propounded such doctrinal background, we shall analyze the controversy brought before us.

Existence of damages suffered by plaintiffs-appellees is not under controversy in the instant matter. Neither is negligence by Nurse Arroyo as to counting of gauzes, her work relationship with the State, and liability by the latter

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for its employees actions, under governance of Art. 1803 of the Civil Code, 31 L.P.R.A. Sect. 5142. It is proper that we evaluate whether physician was negligent Upon leaving a gauze within the body of Plaintiff. We affirmatively conclude so.

(7) We need to emphasize that we are in presence of a very serious omission while a surgical procedure was being performed. Though initial responsibility relative to counting of instrumentation and materials used does befall upon the nurse or assistant, it is the physician in charge who must verify by all means possible, that indeed no objects are present within the surgical area. Counting of objects or gauzes by assistants, is an alternate safety and verification method, to avoid that the surgeon omit his non-assignable duty of removing an object which must not remain inside a patient's body. The physician in charge of the surgery has absolute control over the instruments and materials which he introduces into the human body. Therefore, the primary responsibility of removing all instrumentation introduced into the body befalls upon such physician, and to insure once such surgery is completed, that same have been removed from the patient's body.¹³

13. Within American jurisdiction and under similar situations, an identical conclusion has been reached. Examine, as a comparison: D.W. Louisell, *Medical Malpractice*, M. Bender, 1995, sects. 3.08, 8.08(7), 14.02; 61 Am.Jur. 2d, "Physicians and Surgeons, etc.", sect. 258, page 397-399 (1981). Also see: *Sebastien v. McKay*, 649 So. 2d 711, 714 (La.App. 3 Cir. 1994); *Ravi v. Williams*, 536 So. 2d 1374 (Ala. 1988); *Grant v. Touro Infirmary*, 223 So. 2d 148, 154-155 (La. 1969).

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We concur with statements by the Alabama Supreme Court that upon passing judgment over a case virtually identical to the instant one, concluded:

“the responsibility of removing such gauzes befell upon the physician and not upon those nurses assisting him. He exercised exclusive control over such gauzes from the point when he placed same into plaintiff’s body, until when he removed same. The mere fact that defendant delegated the task of counting said gauzes once these had been removed from the patient, in no way disengages defendant from his first-hand responsibility to have removed same. He bears the duty and responsibility of removing all gauzes. The nurses’ responsibility of counting these after removal, is nothing more than an additional precaution taken by defendant as to assist him in making sure that he has appropriately complied with his duty. (Our translation and original emphasis.) *Powell v. Mullins*, 479 So. 2d 1119, 1126 (Ala. 1985).

(8) The physician must not lose from sight that his direct responsibility towards every patient goes above any over the nurse or the rest of any auxiliary personnel. His responsibility is not adequately discharged with simply delegating upon an assistant the counting of instrumentation, without verifying with full certainty, that no foreign objects have remained within the human body. Such practice is not consequential with diligent exercising of the medical profession which, due to nature of same, requires the greatest degree of care and caution. There exists no justification whatsoever to deviate

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from the most basic rules that need to be followed to guarantee the health, safety and recovery of a surgery patient. In the bare end, we are not in presence of just another object, this deals with a human body and, above all, of a life which is can not be substituted for.

The only evidence as to Dr. Carlo Font's diligence in the performance of his Duties consisted of his affirmation during the hearing in full that "after the surgery he inspected the cavity where he had intervened with (and) . . . did not notice anything abnormal". ENP, page 13.

The Court concluded that the negligent conduct by defendant physicians was not limited to the omission of removing such gauze during surgery. In its sentence it emphasized the fact that Dr. Cruz Santiago had not ordered that Mrs. Cruz Aponte have tests done, from the very first time she complained about abdominal pains during her first visit to their offices, after the surgery, and that Dr. Carlo Font had neither detected nor suspected that something was wrong when he subsequently examined said patient and detected swelling and presence of a mass in her abdominal area. It compared the way in which doctors Cruz Santiago and Carlo Font responded to the attentions which Mrs. Toro Aponte required, with the attention provided by the others physicians which plaintiff consulted with, such as the promptness with which Dr. Casanova detected the cause for the malaise which patient was complaining about, and concluded that the initial physicians did not attain the standard of diligence that such situation demanded.

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In conclusion, the subsequent treatment provided to Mrs. Toro Aponte by doctors Carlo Font and Cruz Santiago, significantly contributed towards delaying and to aggravate the damage. They did not use all means available to carry out a quick and trustworthy diagnosis as to the cause of such infirmity. In view of the aggrieved party's claims, treatment was just limited to prescribing analgesics. Under these circumstances, one most forcibly conclude that more effective measures had been taken, as other physicians subsequently did, the damage would not have been of such a magnitude. Finally, the element of causal relation is ever-present between the negligent omission and the resulting damages therein. The physician's omission, evidently a negligent one, was no doubt whatsoever, the cause of such damage.

(9) As an epilogue, we recall the statements of Joaquin Ataz Lopez, a reputable commentator of medical civil liability: "a lack of expertise shall always be a non-compliance. Whenever any professional commits himself to perform a certain act within his specialty, a presumption of expertise is attributable to him; and if it results that he lacks expertise, he has defrauded that trust granted to him, and has not correctly performed the action entrusted to him, wherefore, his civil liability would be based upon such non-compliance." (Emphasis in the original.) J. Ataz Lopez, *Los Médicos y la Responsabilidad Civil* (Physicians and Civil Liability), Madrid, Ed. Montecorvo, 1985, p. 282.

The negligent behavior displayed by doctors Carlo-Font and Cruz-Santiago, during and alter the surgery, justifies imposing a greater degree of liability for damages. The Court acted appropriately upon modifying the degrees of

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negligence, and impose seventy five percent (75%) to the physicians, and twenty five percent (25%) upon the Commonwealth (E..A.).

III

On the other hand doctors Carlo-Font and Cruz-Santiago sustain that damages suffered by plaintiffs-appellees "were immediate, temporary, and did not leave any disability whatsoever". Allegation by appellants, page 9. As sole grounds to support their conclusion that such compensation needs to be reduced, they quote jurisprudence by this court in which they, allegedly, the magnitude of the damages was greater and the compensation granted was lesser. They sustain that upon comparing the dimension of damages and compensation granted in the captioned case with that of other "similar" cases, it becomes evident that trial court over-estimated plaintiff's damages. They are incorrect.

[10] From the start we reaffirm "that in relation to [the] difficult and anguishing task of comparing assessment of damages, trial courts ordinarily are better positioned than appeals courts to evaluate the situation, whereby they are the one which have a direct contact with the evidence which, to such effects, the claiming party presents therein". *Rodriguez Cancel v. A.E.E.*, 116 D.P.R. 443, 451 (1985). See: *Quinones Lopez v. Manzano Pozas*, 141 D.P.R. 139 (1996); *Torres Solis et al v. A.E.E. et als*, 136 D.P.R. 302 (1994). Hence, the party which requests a modification of the sums granted at the trial level, bears the obligation of demonstrating the existence of those circumstances which deem it meritorious that same be modified. *Rodriguez-Cancel*

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v. A.E.E., *supra*. For said reason, we will only intervene in the amount awarded if it is exaggeratedly high or ridiculously low. *Sanabria v. E.L.A.*, 132 D.P.R. 769 (1993); *Riley v. Rodriguez de Pacheco*, 119 D.P.R. 199 D.P.R. 762, 805 (1987); *Urrutia v. A.A.A.*, 103 D.P.R. 643, 647-648 (1975).

Recall that "there are no two cases exactly the same; each case can be distinguished by its own and varied circumstances. That is why that... the decision rendered in a specific case in relation to this subject, cannot be considered a mandatory precedent for another case". *Rodriguez Cancel v. A.E.E.*, *supra*. See *Vda. de Silva v. Auxilio Mutuo*, 100 D.P.R. 30, 34 (1971); *Baralt v. Baez*, 78 D.P.R. 123, 127 (1955). Assessment responds to single and particular factors which are not subject to indiscriminate extrapolation between one case and another. The compensation granted plaintiffs-appellees needs to be considered, in accordance with the particular facts of this case.

The situation before us displays extensive and severe damages. At the time of these events, the aggrieved party was twenty eight (28) years old, and enjoyed perfect health. She suffered severe organic damages, as an immediate result of the negligence by the nurse and physician who attended her during surgery; she had to go through two (2) additional operations, after which she was forced to remain admitted at the hospital in a convalescent state. As if this were not enough, she was forced to use an artificial attachment adhered to the perforation in her abdomen for ten (10) months to be able to evacuate, which severely affected her intimate relations and hindered performance of her household and

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recreational tasks. Finally, she was afflicted by an intense and constant pain for more than two (2) months. At present she continues to suffer pain to her digestive system, and whenever having sexual relations. Her abdomen was marked permanently by a second scar, which intersects perpendicularly to the cesarean one. ENP, page 5.

Plaintiffs also presented evidence relating to damages suffered by Mr. Alvarez Velez, as a result of the damages suffered by Mrs. Toro Aponte. According to what he testified at trial, his partner's physical condition and mood caused him much suffering and affected their mutual relations, to the extreme that he considered the possibility of separating. To attend to them both, mother and daughter, he became dependent upon the assistance of other persons for performance of household chores. ENP, pages 6-8.

This factual background confirms the magnitude of the damages caused sufficiently as to not intervening with the compensation granted. The arguments leveled by doctors Cruz Santiago and Carlo Font do not convince us that the compensation granted by the trial court was exaggerated. Evidence by plaintiffs satisfied, to the trials court's satisfaction, the serious of the damages, evidence which was not rebutted by defendants. The comparative examination of jurisprudence indicated by defendants- appellants does not persuade us to modify the trial court's ruling.

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IV

Lastly, defendants-appellants indicate that the sentencing forum erred upon concluding that they had admitted their civil liability for such negligence. They indicate that, although they had admitted the occurrence of a negligent omission, they had not accepted liability.

Such indication lacks grounds. Attorney for defendants, Jaime V. Biaggi, Esq., admitted in two (2) occasions before the trial court "that his retainers had accepted liability . . ." Minutes dated October 10th of 1989. Copy of the minutes were sent to attorney Biaggi on October 16th of 1989, and the record does not evidence that same had been objected. Defendants also stated to the Court, on several occasions, that they did not know upon what party and up to what degree, negligence should be imposed, subtracting credibility from their argument, that they had denied liability. In any case, admitting the occurrence of a negligent omission reduced such controversy, to determine upon whom befell the primary liability therein. The Court, on basis of the evidence and not solely upon the defendant-appellant's admission of liability, ruled that they were the ones proper to take appropriate measures towards avoiding occurrence of any damages and that said omission was the cause of such damages.

Due to the afore stated grounds, the trial court's sentence if affirmed inasmuch as joint liability by the Commonwealth (E.L.A.) and doctors Carlo Font and Cruz Santiago, as well as the Ruling which modified respective degrees of negligence. Appropriate sentence shall be rendered therein.

Associate Judge Mister Rebollo-Lopez issued the dissenting opinion. Associate Judge Mrs. Naveira de Rodon inhibited herself.

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Dissenting opinion issued by Associate Judge Mr. Rebollo Lopez

We are not able to conform with the decision which the Court has rendered in the instant case. We specifically and vehemently dissent with the erroneous actions by the Court upon establishing a norm which imposes civil liability, in an absolute and automatic fashion, to surgeons in this country, as it relates to each and every one of all acts of negligence in which employees of a surgical room may incur into, while performing a surgical procedure; persons who are not employees of said physicians, who were neither selected or trained by them and who were so, by the hospital firm in which such procedure was carried out.

The majority of the members of this Court imposed or establish such absolute civil liability to surgeons within our country by applying for the first time, without expressly stating so, the "captain of the ship doctrine"¹, doctrine developed within "Common Law" jurisdictions and which, currently, are not only are discredited and in disuse but, moreover, is a minority one.

The erroneous decision rendered (herein) shall, unfortunately, have the inauspicious result of hinder such

1. This Court, in *Vda. de López v. E.L.A.*, 104 D.P.R. 178 (1975), left *quare* the ruling as to whether or not the "captain of the ship doctrine" should be adopted in Puerto Rico. Specifically, it was then stated that "(it) was unnecessary to decide . . . Whether to adopt the captain of the ship doctrine in Puerto Rico or not, since we deem that plaintiff's proof was insufficient to rebut the presumption of reasonable care towards the patient". (Note omitted). *Id.*, page 182.

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medical specialists from delegating to surgical room employees at the hospital, duties which have been traditionally delegated upon said assistants, for means of a more efficient and effective surgical practice. That is, the currently established rule of absolute liability shall force the surgeon to personally perform most of the duties which, ordinarily, are performed by said employees; This, for the purpose of being able to verify that such duties have been correctly executed. The Majority forgets that best practice of medicine makes it imperative that surgeons carry out their surgical duties free from "distractions" which entail Not being able to delegate said activities upon support personnel.

Henceforth, we can visualize the chaos which will prevail in surgery rooms throughout the country, in view of the justifiable "paranoia" from surgeons in verifying, to the point of doing so themselves, that information that has traditionally been provided by surgery room support personnel, are correct. We can imagine, then, such surgeon unnecessarily counting instruments and materials prior to initiating surgery, performing the surgery and, at the same time, making sure to take all of the patient's vital signs and if said patient is reacting adequately to the anesthesia administered to him.

I

From the start, we must recall "that law of torts in Puerto Rico is controlled, with certain given exceptions established under our legislation, by rules of civil procedure. Rules from Common Law and from other juridical systems may provide useful material for a comparative study and, on occasions, the development of autochthonous institutions". *Gierbolini v. Employers Fire Ins. Co.*, 104 D.P.R. 853, 855 (1976).

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On this day, the Majority of this Court sidelines said rule, using as grounds for their ruling, doctrines alien to our civil law system. We believe that the instant controversy should have been resolved in accordance with the mandates of the civil system. *See: Gierbolini v. Amer. Int. Ins. Co., supra, Valle v. Amer. Inter. Ins. Co.*, 108 D.P.R. 692 (1979). In spite of this, we have inquired within Anglo-Saxon law sources, such as the Majority did, with the intent of demonstrating that, even under such legal system invoked by them, their decision is erred.

Traditionally, in the United States and as it relates to this aspect within this field of torts, a doctrine of "principal and agent" has been established in terms of adjudicating liability in view of any specific negligent act. American courts have, specifically, utilized the doctrine of *Respondeat Superior*, to impose a liability upon the superior or employer, for the negligent actions of their agents or employees. Under said Doctrine, it is presumed that the principal (employer) has the means and power to control the actions of their employees (agents). That is, under said doctrine, the employer responds in whatever measure under Which it has control over the negligent actions of their employees or agents.

Respondeat Superior is, thus, a modality of the "Vicarious Liability" Doctrine, In which the principal responds in whatever measure such stated action is executed by the agent, within the scope and course of his duties therein. *Legal Medicine: Legal Dynamics of Medical Encounters*, American College of Legal Medicine, Saint Louis, The C.V. Mosby Co., 1988, page 73.

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In light of such Doctrine, several doctrines surfaced within Anglo-American Law, applicable to medical cases, one of which is the "captain of the ship doctrine". Said doctrine surfaced in the United States as a result of that prior to 1940, persons who suffered damages as a result from surgical procedures, had limited possibilities of receiving compensation through judicial means. That being so since under the prevailing judicial system of the time, hospital Firms were immune from such types of claims, since they effected charitable Causes which benefited the community as a whole (charitable immunity). Furthermore, the economic frailty and the fear that one single sentence would eliminate a given hospital's future, became a real threat, in view of the important social function executed by such hospitals. J.R. Yungtum, The "Captain of the Ship" Sets Sail in Nebraska: Long. V. Hacker, 29 (No. 1) Creighton L. Rev. 379, 390'391)1995.

With the intent of offering plaintiffs an actual possibility of being compensated, the Pennsylvania Supreme Court established the so-called Captain of the Ship Doctrine" in the case of *McConnell v. Williams*, 65 A. 2d 243 (Pa. 1949). In said case, stated judicial forum pointed out that, under said doctrine, it is the surgeon who shall be responsible for the negligence of any person present within the surgery room, such as a captain of a ship is responsible for all of the actions by his crew.

Subsequently, immunity of hospitals became a thing of the past; this particularly since hospitals began to protect their interests by obtaining insurance for their employees. Yungtum, *supra*, page 392, quoting S.A.H. Price, The Sinking

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of the "Captain of the Ship". Reexamining the Vicarious Liability of an Operating Surgeon for the Negligence of Assisting Hospital Personnel, 10 J. Legal Med. 323, 332 (1989). Already by the decade of the mid forties, most American jurisdictions stopped applying the "Captain of the Ship" Doctrine, same being considered out of style and its applicability as unnecessary, since such doctrine no longer complied with the purpose for which same had been developed. Yungtum, *supra*, page 394. It seems curious to point out that the jurisdiction which originally established the "Captain of the Ship" Doctrine, that being Pennsylvania, has abandoned same and uses the Borrowed Servant Doctrine. *Thomas v. Hutchinson*, 275 A. 2d 23 (Pa. 1971).²

Moreover, the State of Maryland abolished the "Captain of the Ship" Doctrine in view of the change of scope about hospitals as charitable institutions. In *Franklin v. Gupta*, 567 A.2d 524 (Md. Ct. Spec. App. 1990), said Federal Forum pointed out that there no longer exist economic reasons which justify imposing vicarious liability upon surgeons, in response to victims of medical lack of expertise. *Id.*, page 538. Stated court indicated that although a physician may be liable, whenever he borrows an employee from another, the decision in *McConnell v. Williams*, 65 A 2d 243 (Pa. 1949), same must not be seen as imposing liability *per se* upon all surgeons, rather that liability may be imposed on basis of the master and servant doctrine.

2. The Texas Supreme Court, in turn, has specifically pointed out that it totally disapproves the "Captain of the Ship" Doctrine. *Sparger v. Worley Hospital, Inc.*, 547 S.W. 2d 582 (Tx. 1977).

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Under the Master and Servant Doctrine (agent theory), a physician is liable for the negligence of his employees or "servants", most of such cases dealing with nurses, assistants or technicians to whom such physician himself pays salaries To, and respond solely to his instructions. That is, a physician does not respond vicariously unless his own employee or "servant" has been the cause of damages in question, during the course of his employment. J. Talbot Young, Jr., *Separation of Responsibility in the Operating Room; The Borrowed Servant, the Captain of the Ship, and the Scope of Surgeons' Vicarious Liability*, 49 (No. 4) *Notre Dame Law* 933, 934 (1974).

Whenever an employee has a single employer, it becomes easy to determine who has "vicarious responsibility" for the actions of the former. Nevertheless, such situation become more complicated when, as in the instant case, the nurse is an regular hospital employee, but the physician "borrows" her services for a specific surgical procedure. As a result of such situation, the United States developed another off-shoot of the "Respondeat Superior" Doctrine known as the "Borrowed Servant". Contrary to the "Captain of the Ship" Doctrine, according to which the surgeon is responsible for all negligent acts which take place in the surgery room by any of the persons present therein, under the Borrowed Servant Doctrine, this is not necessarily so.

The Borrowed Servant Doctrine consists in that the employer or principal "loans-out" his agent or employee to a third party. Whether such "loan" is free or remunerated does not control. *Legal Medicine: Legal Dynamics of Legal Encounters*, op. cit, page 73. If the second employer, that

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being the physician in the instant case, assumes absolute control over said employee, then this second employer is who must be liable for negligent acts committed by the employee; that is, what is critical is to decide who exercised control over said employee at the time of the negligent action. Nevertheless, if it is determined that both employers exercised equal control over the employee, then both employers are liable. *Id.*

The above stated constitutes one of the reasons why we cannot agree with the position taken by the Majority of this Court, by imposing such liability upon doctor Carlo Font, for the negligent actions by the nurse, a hospital employee, simply because she was under temporary supervision from stated physician. It is an undeniable fact that the doctor did count upon the services of said nurse during the surgical procedure. Nevertheless, during said period of time said nurse did not cease to be a hospital employee. It was the hospital which paid for her services, which decided her work schedule, that evaluated her services and which had a right to retain or dismiss her. Moreover, it was the hospital the one responsible for verifying her credentials at the time they contracted her services, and which had the duty of training her in an optimal manner, according to the duties and obligations proper of her post. We must not lose sight that the surgeon does not choose the personnel assisting him during surgical procedures which he performs at a given hospital.

By the mere fact that the nurse rendered her temporary services to said doctor, he had not ceased to be directly responsible to the hospital. See: *Foster v. Englewood Hospital Association*, 313 N.E.2d 255 (1974); *Olander v.*

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Johnson, 58 Ill. App. 89 (1930). We believe that the statements formulated in the stated *Olander* case, *supra*, are very wise, to the effect that:

*Generally, an operating surgeon is not legally responsible for the mistake of a nurse, not his employee, where an operation performed at a hospital not owned or controlled by the surgeon.*³

Furthermore, he requested a materials count from the nurses, who informed him that such count was correct. Parties in said case accepted that the surgeon has a duty to engage all his attention to said surgery, and that the patient's life would be affected if the surgeon were to also take time towards counting used and removed gauzes. The court ruled that it was indisputable that surgery in this case had been carried out according to the rules and customs established by the hospital, and that the doctor made sure that institutional rules regarding counting of gauzes were carefully and correctly followed. Stated court further determined that the fact that one of the nurses committed an error, was not the surgeon's fault, and that same had been committed, regardless of all precautions that had been taken. It was emphasized that the surgeon requested the count, examined the area, and everything looked fine; moreover, he followed all of the methods approved for examining a patient after surgery. Stated court concludes by indicating:

3. In the case of *Olander v. Johnson*, 258 Ill. App. 89 (1930), the plaintiff had his appendix removed and, inadvertently, the doctor left a gauze within his abdominal cavity. The doctor had carried out a visual inspection of the patient's surgical area, not finding any gauze of foreign material whatsoever.

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"In short, just as a rule making a surgeon liable for every negligent act of every hospital employee under his control is too harsh, a rule exculpating him for every negligent act of persons under his control simply because they are not his employees, is lenient." Olander v. Johnson, supra, page 261.

In the case of *Foster v. Englewood Hospital Association*, 313 N. Ed.2d 255, 260 (1974), it was noted that *"a nurse is still subject to the rules and regulations of the hospital, and the doctor may not gainsay them. She may be discharged by the hospital but not by the doctor. The hospital, not the doctor, furnishes the equipment that the nurse uses, and she is paid by the hospital. We conclude, therefore, that the employees of the hospital assisting a surgeon remain the employees of the hospital, even though the surgeon retains some degree of control over them"*. (Quotes omitted and emphasis provided.)

However, there is more. It is proper to emphasize the fact that in North American jurisdiction a distinction has been made between acts or duties performed by the nurses called "administrative", and others which involve certain medical skill or judgment. Thus, it has been understood that surgeons are liable for the negligence in which a nurse may incur in the performance of her "medical" duties, while the surgeon is not liable for negligence occurring during the performance of her "administrative" duties, since with respect to these types of duties, she is acting as a hospital employee. See: 61 Am. Juris 2d Sec. 288, page 438 (1981); *Rural Educational Association v. Bush*, 298 S.W.2d 11 (Fla. 1967). *Buzan v. Mercy Hospital, Inc.*, 203 So. 2d 11 (Fla. 1967). Specifically, hospitals respond for negligence by their nurses upon performing "administrative duties", which, even when same

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are essential for the patient's well-being and success of the surgery, do not require use of specialized knowledge or techniques. *Swigerd v. City of Ortonville*, 75 N.W. 2d 217 (Minn. 1956).

The case of *Buzan v. Mercy Hospital, Inc.*, *supra*, is an illustrative one. In same, a surgeon and the hospital were sued, since during the surgery, a foreign object was left inside his abdomen. The court went on to consider whether the nurse who had assisted the surgeon during the operation, and who had counted the materials, was a employee (servant) of the hospital, or was a borrowed servant of the surgeon. They recognized the need to carry out a distinction between the type of act or service attributed to the hospital nurse, upon assisting with the surgery. Stated court indicated the following:

Basically, duties of such an assisting nurse which involve professional skill or decision are regarded as controlled solely by the surgeon or doctor. On the other hand, in performing services or acts not involving professional skill or decision, and which are ministerial in character, a hospital nurse assisting a surgeon is not regarded as a borrowed servant. A sponge count by an assisting nurse generally is held to be in the latter category. (Emphasis provided)⁴ Buzan v. Mercy Hospital, Inc., supra, page 13.

4. One must keep present that the majority of American courts which have found physicians liable for the negligence of other persons who are present in the surgery room or which have used the "Captain of the Ship Doctrine" have done nothing else than apply

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The same as with the instant case, the majority of these malpractice cases are related to having left gauzes or other foreign objects within the bodies of patients, upon performing a surgical procedure. Physicians have been imposed a responsibility since their negligence may be inferred by the mere fact that the patient has a foreign body, after the surgery. Notwithstanding, if the theory of *Res Ipsa Loquitur* is applied, negligence is direct, not vicarious, and physician may prove the contrary. See: *Martin v. Perth Amboy General Hospital*, 104 NJ Super. 335, 250 A 2d 40 (NJ Super 1969); *Sanzari v. Rosenfeld*, 34 NJ Super, 128, 140 (1961); *Davis v. Kerr*, 239 Pa. 351, 86 A. 1007 (1913).

As to this last aspect, we join what has been ruled by several American courts to the effect that the surgeon physician shall not be liable for leaving foreign objects within the body of patients, if he exercised a reasonable degree of care to avoid this from happening, and that he cannot become liable for the fact that, in effect, a gauze was left inside the body of a patient. *Miller v. Tongen*, 281 Minn. 427, 161 N.W. 2d 686 (1968); *Rayburn v. Day*, 126 Or. 135, 268 P. 1002 (1928).

It is in light of the above statements that we dissent from the majority opinion of this Court. Negligence in the instant case bore exclusively upon the nurse, for not having kept

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the *Res Ipsa Loquitur* Doctrine. *Rudeck v. Wright*, 218 Mont. 41, 709 P.2d 621 (Mont. (1985)); *Burke v. Washington Hospital Center*, 475 F. 2d 364 (Circ. D.C. 1973); *Ales v. Ryan*, 8 Cal. Rptr. 2d 82 (1936); *Shannon v. Jaller*, 6 Ohio App. 2d 206, 217 N.E. 2d 234 (1966); *Ybarra v. Spanguard*, 25 Cal. Rptr.2d 486 (Cal. 1944).

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adequate count of instruments and materials used during the surgical procedure, duty that is purely administrative or ministerial, wherefore her employer, the hospital, must be liable.

II

Applying everything indicated above to the instant case, our opinion is that there exists no other conclusion other than liability by the hospital for the negligent actions in which its employee nurse Norma Arroyo, incurred and not, as erroneously ruled by the Majority, doctor Carlo-Font.

As in fact it arises from the majority opinion issued by the court itself, during the surgical procedure effected upon co-plaintiff Toro, present was a nurse, employee of the Commonwealth of Puerto Rico, who was specifically in charge of, among other duties, counting the surgical instruments and gauzes which were used by said surgeon, during same. Upon "finishing" said surgery but before proceeding to suture said patient, Dr. Jorge Carlo Font - the surgeon - specifically requested that nurse - Mrs. Norma Arroyo - count the instruments and gauzes used during same; this, with the obvious purpose of avoiding precisely what occurred, that is, that some gauze or instrument be left within the abdominal cavity. Said nurse assured the surgeon that all instruments and gauzes used in the surgery were outside of the patient's body.⁵ Not content with the stated affirmation

5. To these effects, said nurse signed a certification after the procedure was completed, which is a requirement that needs to be complied with in these cases.

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by nurse Arroyo, doctor Carlo Font Examined the patient's body, not detecting any gauze or instrument, after which he proceeded to suture up the patient.

In other words, and stated in a simpler fashion, Doctor Carlo Font, during Said surgical procedure, exercised all the care which could be demanded Upon a surgeon, under this type of situation. That is, stated co-defendant, at that point, rendered to his patient the medical attention which, in light of modern means of communication and teachings, and in accordance with the state of scientific knowledge and prevailing practices within medicine, satisfies demands generally acknowledged by the medical profession itself. *Rodriguez Crespo v. Hernandez*, 121 D.P.R. 639 (1988). We should not, I repeat, lose sight that no surgeon, during the course of an operation be attentive to and keep count of how many gauzes are used during same, either by himself, as well as by any of his assistants.

If stated responsibility is demanded of him, there would be no reason whatsoever, just as an example, the he keep count of, personally and continuously, of how much anesthesia the patient is being given and what is his heart pulse rate per minute, as well as what is the patients blood pressure. This befalls upon the anesthesiologist who participates in such surgery the surgeon by necessity trusting upon the information which the other provides him with. We cannot understand how this Court can establish in this era of medical advancements in which we live, the rule that, in effect, we are in presence of an "omission of a serious nature" from such surgeon. We repeat, that pertains to support personnel existing at those surgery rooms.

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This view by the Majority ignores modern techniques within this area of medicine. We can take judicial knowledge of the fact that as of today surgical procedures are performed, whereby a surgeon does the initial incision in the patient's body, and another is the one who performs such delicate surgery proper, and another one sutures. This is ordinarily done with the intention that the specialized surgeon can participate in numerous surgeries during the same day, he not being present when the surgery "begins" or whenever the same is "completed". Said situation, as is well known, is typical for open heart surgery. It is proper that we ask ourselves: if a gauze is left inside a patient's body during any one of these surgeries, which surgeon would be then liable? The one who did the initial incision, the one who does the specialized surgical procedure, or the one who sutures, or all of them, in spite of the fact that there exists a possibility that upon "completing" the surgery, some of them were not physically present at the surgical site?

Would it not, consequently, be more reasonable to establish a rule in effect, that it is the support personnel's responsibility to correctly count surgical instruments and materials which were used during the surgery, task which does not require any medical knowledge or skill whatsoever?

III

Regardless of everything stated above, we must acknowledge that defendants appellants were negligent during the post-surgical treatment that they rendered co-plaintiff Toro-Aponte, upon not noticing the possibility that a gauze may have been left within her abdomen and/or upon

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not ordering appropriate and standard tests to be performed on her, in timely manner, for these sorts of cases; negligence which, with greatest probability, unnecessarily aggravated such person's condition and, consequently, the physical damages and mental anguish which said stated co-plaintiff suffered.

In other words, it is our opinion that in such stage of the occurrence, appellant physicians did not render their patient that medical attention which, in view of current means of communication and teachings, and in accordance with current scientific knowledge and prevailing practices within medicine, complies with generally acknowledged demands of the medical profession itself. *Rodriguez Crespo v. Hernandez, supra.*

Contrary to the majority of the members of the Court, nevertheless, our opinion is that the percentages for negligence which were ruled as proper by the trial court, must be inverted. That is, it is our opinion that co-defendant nurse and her employer, the Hospital, should become liable for seventy five (75) percent of damages decreed thereto, and appellant physicians for a twenty five (25) percent.

It is for all of the above that we dissent.

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CERTIFICATION

CERTIFIED: To be a true and correct translation of its original document in the Spanish language, into English and to the best of my ability as a Federally Certified Translator & Interpreter for the U. S. District Court for the District of Puerto Rico and for the Administrative Office of the United States Courts.

Carlos T. Ravelo, USCCI*

***THIS IS AN E-MAIL CERTIFICATION WITH**

**THE SAME VALIDITY AND FORCE AS THE
ONE BEARING MY SIGNATURE.**

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No. 05-721

Supreme Court of P.R.
JAN 17 2006
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IN THE
Supreme Court of the United States

TURABO MEDICAL CENTER, INC. D/B/A HOSPITAL
INTERAMERICANO DE
MEDICINA AVANZADA,

Petitioner,

v.

MARÍA YOLANDA MARCANO RIVERA ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

REPLY BRIEF FOR PETITIONER

ORLANDO H. MARTÍNEZ-
ECHEVERRÍA
FERNANDO E. AGRAIT
701 Ponce de León Avenue
San Juan, P.R. 00907
(787) 722-2378

THEODORE B. OLSON
Counsel of Record
THOMAS H. DUPREE, JR.
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition relies on rhetoric and mischaracterization in an unavailing effort to reconcile the decision below with *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). But nothing in respondents' brief can conceal the fact that the First Circuit's decision to apply the federal excessive damages standard in a diversity case governed by Puerto Rico law directly conflicts with *Erie*, and worsens the circuit split over the proper application of *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

Respondents frame the question presented as "whether the First Circuit erred in concluding that, *under Puerto Rico case law*," the medical malpractice damages awarded to respondents were not excessive. Opp. i (emphasis added). But the First Circuit *did not apply* "Puerto Rico case law." Rather, the court concluded that because the Puerto Rico excessiveness standard is worded in "terms similar" to the federal "grossly excessive" test, *Gasperini* did not require application of the Puerto Rico standard. Pet. App. 17a. Thus, rather than compare the award to similar medical malpractice awards issued in Puerto Rico courts—the approach mandated by Puerto Rico Supreme Court precedent—the First Circuit simply compared the award to another First Circuit decision, and proceeded to uphold it. Pet. App. 18a.

By declining to compare the award to those approved in similar Puerto Rico cases, the First Circuit was able to uphold a significantly larger award than respondents could have obtained in Puerto Rico court. The decision below therefore contravenes *Erie*'s fundamental purpose of ensuring substantial uniformity of outcome between state-law claims tried in state and federal court, *see Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945), and exacerbates the circuit split over whether *Gasperini* commands federal courts sitting in diversity to apply state or federal excessiveness standards.

I. THE DECISION BELOW CONFLICTS WITH *ERIE*.

“*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court,” and therefore mandates that federal courts sitting in diversity apply substantive state-law excessive damages standards. *Gasperini*, 518 U.S. at 431. When respondents’ legal and factual mischaracterizations are stripped away, it becomes apparent that the First Circuit’s refusal to apply Puerto Rico’s medical malpractice excessiveness standard to review the \$5.5 million verdict in this Puerto Rico law diversity action is inconsistent with *Erie*.¹

Respondents contend that the First Circuit’s decision can be reconciled with *Erie* because Puerto Rico’s excessive damages standard is identical to the federal standard and thus is not “substantive” for *Erie* purposes. Opp. 13-15. But this is plainly incorrect, as the Puerto Rico standard commands courts to compare the award to verdicts in other Puerto Rico medical malpractice cases. *See Nieves-Cruz v. Universidad*

¹ Respondents describe HIMA’s references to a \$5.5 million verdict as “misleading[],” Opp. 1, because the jury found both HIMA and Dr. Pedro Roldán Millán (the obstetrician who induced and managed the delivery of Fabiola) at fault, and apportioned 47% of the damages to HIMA and 53% to Dr. Roldán. Pet. App. 6a. But an excessiveness inquiry focuses on whether the damages awarded are more than necessary to compensate the plaintiff for his or her injury. Thus, the relevant figure is the total amount of the jury award, not the amount imposed against a particular party after discounting for comparative fault. Respondents also suggest that it is “undisputed” that Fabiola was injured “because of petitioner’s negligence.” Opp. i. This is a blatant mischaracterization of the record. HIMA’s negligence was not “undisputed.” To the contrary, HIMA has always taken the position—at trial and now on appeal—that it was *not* negligent. *See* Pet. App. 8a.

de Puerto Rico, 151 P.R. Dec. 150 (2000) (Pet. App. 53a) (reducing a malpractice award because it exceeded the “parameters” of precedent).

The Puerto Rico Supreme Court adopted this approach in light of its concerns about the “difficult and distressing” nature of judicial attempts to “estimat[e] and apprais[e] damages” in medical malpractice cases. *Nieves-Cruz*, 151 P.R. Dec. 150 (Pet. App. 51a). Much as other jurisdictions have imposed statutory damage caps on medical malpractice awards, Puerto Rico has sought to ensure “reasonable limits” and promote consistency through this comparative review process. *Riley v. Rodríguez de Pacheco*, 119 P.R. Dec. 762 (1987) (Pet. App. 212a-13a). And just as *Erie* requires federal courts sitting in diversity to apply state-law statutory caps limiting malpractice awards, *see Gasperini*, 518 U.S. at 428-29, a federal court adjudicating a medical malpractice claim under Puerto Rico law must adhere to those decisions implementing Puerto Rico’s comparative excessiveness standard because that standard embodies Puerto Rico’s substantive policy of maintaining consistency among malpractice awards. *See id.* at 429 (concluding that New York’s excessive damages standard, which required a comparison with awards in previous cases to determine whether the verdict “deviate[d] materially” from prior awards, was substantive for *Erie* purposes).²

² Respondents attempt to distinguish New York’s “deviates materially” standard from the comparative inquiry used to implement that standard, arguing that only the “deviates materially” standard—not the comparative inquiry itself—was substantive for *Erie* purposes. Opp. 15. This reading of *Gasperini* is insupportable. The *Gasperini* Court explained that the New York excessive damages statute embodied an “objective [that] is manifestly substantive” and therefore held that federal courts sitting in diversity must undertake the same comparative inquiry as a New York state court. 518 U.S. at 429, 437. Indeed, it would have been impossible for a federal court to implement the “deviates materially” standard without performing the comparative analysis that undergirded it.

Contrary to respondents' mischaracterizations (Opp. at 1, 7, 9), HIMA does not suggest that Puerto Rico's standard mechanically requires the reduction by fifty percent of all medical malpractice awards. The Puerto Rico standard instead requires that such awards be compared to prior verdicts upheld in similar medical malpractice cases in Puerto Rico courts. There is thus a fundamental distinction between the Puerto Rico excessiveness standard and the federal standard applied by the First Circuit: the Puerto Rico standard requires a comparison with previous awards in *Puerto Rico* cases; the federal standard requires a comparison with prior *federal* decisions. *Compare Nieves-Cruz*, 151 P.R. Dec. 150 (Pet. App. 53a) (comparing a malpractice award with the verdict in *Riley*), with Pet. App. 18a (comparing the award against HIMA with the verdict in *Muniz v. Rovira*, 373 F.3d 1 (1st Cir. 2004)).

Indeed, subsequent to its *Riley* decision, the Puerto Rico Supreme Court has consistently reviewed medical malpractice awards for excessiveness by comparing the size of the award with those in previous Puerto Rico cases. *See Blás Toledo v. Hosp. Nuestra Señora de la Guadalupe*, 146 P.R. Dec. 267 (1998) (Pet. App. 152a) (reducing a medical malpractice award to a brain-damaged child and her mother from \$2.2 million to \$1.55 million after comparing the award with the verdict in *Riley*); *Nieves-Cruz*, 151 P.R. Dec. 150 (Pet. App. 53a) (relying upon *Riley* to reduce by half a \$3.975 million medical malpractice award to a brain-damaged child); *see also Riley*, 119 P.R. Dec. 762 (Pet. App. 214a) (reducing by half an \$800,000 medical malpractice award to a brain-damaged child). Notably, the only other medical malpractice excessive damages case cited by respondents utilized just such a comparative inquiry. *See Toro Aponte v. E.L.A.*, 142 P.R. Dec. 464 (1997) (Resp. App. 28a) (affirming a medical malpractice verdict because the "comparative examination of jurisprudence . . . does not persuade us to modify the trial court's ruling").

Notwithstanding respondents' protestations, the cases relied upon by HIMA were not "carefully selected" from among conflicting Puerto Rico precedents. Opp. 6. *Riley*, *Nieves-Cruz*, and *Blás-Toledo* provide an authoritative statement of Puerto Rico's medical malpractice excessiveness standard. They therefore were the only Puerto Rico excessive damages cases submitted in translated form to the First Circuit and are the only Puerto Rico excessive damages decisions that the court of appeals cited. Pet. App. 16a.

Riley, *Nieves-Cruz*, and *Blás Toledo* are also the most factually relevant precedents. Indeed, the facts of *Nieves-Cruz*, where a \$3.975 million verdict was awarded to a child who suffered neonatal asphyxia during birth due to the improper administration of drugs to the mother (151 P.R. Dec. 150 (Pet. App. 35a)), are virtually indistinguishable from this case, where Fabiola was awarded \$4.0 million to compensate for the injuries attributable to the neonatal asphyxia she experienced during birth. The Puerto Rico Supreme Court reduced the *Nieves-Cruz* award by half because it was "substantially higher than what [the court] ha[d] granted in cases similar to this case." Pet. App. 52a.

Similarly, in *Blás Toledo*, the Puerto Rico Supreme Court reduced by half a \$500,000 medical malpractice award that compensated a brain-damaged child for her mental and physical suffering and an \$800,000 award that compensated the mother for her emotional pain. 146 P.R. Dec. 267 (Pet. App. 152a). Respondents attempt to distinguish *Blás Toledo* on the ground that the child had died during the appeal. Opp. 9. But the Puerto Rico Supreme Court placed absolutely no weight upon the child's death when reducing the award; the court instead explained that it was seeking to bring the size of the award into conformity with the *Riley* benchmark. See Pet. App. 152a ("it is our opinion that the \$800,000 compensation awarded for such items by the trial court is 'exaggeratedly high,' especially in light of the decision in *Riley v. Rodríguez de Pacheco*").

Accordingly, if respondents had pursued the suit that they initially filed in Puerto Rico court, the Puerto Rico Supreme Court would have effectuated Puerto Rico's substantive policy of promoting consistency among medical malpractice awards by relying upon *Riley*, *Nieves-Cruz*, and *Blás Toledo* to reduce the jury's \$5.5 million award to an amount commensurate with the awards in previous cases.

None of the other Puerto Rico cases cited by respondents involves an excessive damages challenge to a medical malpractice award. Several of them are not even medical malpractice cases. See *Elba A.B.M. v. U.P.R.*, 125 P.R. Dec. 294 (1990) (reviewing an award for injuries resulting from a sexual assault); *Quiñones Lopez v. Manzano Pozas*, 141 P.R. Dec. 139 (1996) (reviewing an award for injuries resulting from a car accident). The lone medical malpractice case cited by respondents is a nonprecedential per curiam opinion that involved additur—not remittitur. See *Velazquez Ortiz v. U.P.R.*, 128 P.R. Dec. 234 (1991).

Contrary to respondents' suggestion, the First Circuit's violation of *Erie*'s animating principles did not constitute "harmless error." Opp. 17. If the First Circuit had adhered to *Erie*'s strictures by applying the Puerto Rico medical malpractice excessiveness standard, it would have compared the \$5.5 million verdict with the significantly smaller awards in *Riley* (\$400,000 for a brain-damaged child's mental and physical injuries), *Nieves-Cruz* (\$1.987 million for a brain-damaged child's physical injuries, impaired income potential, and future expenses), and *Blás-Toledo* (\$250,000 for a brain-damaged child's mental and physical suffering and \$400,000 for the mother's emotional suffering). On the basis of these precedents, a Puerto Rico court would have reduced the verdict against HIMA because it is "exaggeratedly high" when compared with the amounts in those factually similar cases. The First Circuit, in contrast, did *not* compare the award in this case to the awards in *Riley*, *Nieves-Cruz*, or *Blás-Toledo*. Its failure to undertake this comparative inquiry enabled re-

spondents to recover a larger award than they would have obtained in Puerto Rico court and thus impeded *Erie*'s objective of securing "substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988).

This Court's review is warranted to ensure—as *Erie* envisioned—that the happenstance of diversity of citizenship does not result in a larger award being recovered in federal court than would have been obtained in state court.

II. THE DECISION BELOW WORSENS THE CONFLICT AND CONFUSION OVER *GASPERINI*.

Respondents' effort to harmonize the circuits' varying approaches to *Gasperini* only highlights the confusion in the lower courts, and further demonstrates the need for plenary review.

The circuits are split three ways over the application of *Gasperini*'s holding that federal courts sitting in diversity must apply substantive state-law excessiveness standards. One group of circuits—including the Eighth and Tenth—interprets *Gasperini* as requiring the application of state excessiveness standards in *all* diversity cases; another group—including the Sixth, Seventh, and Ninth—has issued post-*Gasperini* opinions that continue to apply the federal excessiveness standard in diversity cases, without even considering the possibility of applying state law; and a third group—including the First Circuit—applies state-law excessiveness standards in diversity cases unless the state standard is worded in "terms similar" to the federal standard. Pet. App. 17a.

Respondents assert that "[t]here is no conflict" among the circuits because "any-one of them" would have applied the federal excessiveness standard in this case. Opp. 19. But this is obviously incorrect. Because the Eighth and

Tenth Circuits consider *all* state-law excessive damages standards to be substantive—including those state-law standards worded in terms similar to the federal standard—those courts would have applied the Puerto Rico excessiveness standard and evaluated the propriety of the award against HIMA by comparing it with awards in other Puerto Rico cases. See *Rustenhaven v. Am. Airlines, Inc.*, 320 F.3d 802, 805-06 (8th Cir. 2003) (applying the Arkansas excessive damages standard in a diversity action, even though the state-law standard was phrased similarly to the federal standard); *Century 21 Real Estate Corp. v. Meraj Int'l Inv. Corp.*, 315 F.3d 1271, 1281 (10th Cir. 2003) (same for New Jersey law).

The Sixth, Seventh, and Ninth Circuits may well have applied the federal excessiveness standard to evaluate the award against HIMA because they have each issued post-*Gasperini* opinions applying the federal standard in diversity actions without undertaking any *Erie* analysis. See *Miksis v. Howard*, 106 F.3d 754, 764 (7th Cir. 1997) (“We use federal standards to determine excessiveness of verdicts in diversity cases.”); *Am. Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 475 (6th Cir. 2004) (same); *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001) (same). Respondents point to decisions in which the Sixth, Seventh, and Ninth Circuits have applied state excessiveness standards in diversity actions. See, e.g., *Jabat, Inc. v. Smith*, 201 F.3d 852, 857 (7th Cir. 2000). But even assuming that respondents have accurately characterized those cases,³ the inconsistency *within* these circuits would only underscore the con-

³ For example, respondents rely on *Galam v. Carmel*, 249 F.3d 832 (9th Cir. 2001), which they characterize as holding that federal courts sitting in diversity must apply state substantive law regarding attorney’s fees. Opp. 16. But *Galam* actually held that federal law governs when attorney’s fees are awarded as a sanction for misconduct in federal court, see 249 F.3d at 838, and, in any event, the relevance of an attorney’s fees case to this case is not readily apparent.

fusion over how to apply *Gasperini* and would further demonstrate the existence of a circuit split.

This Court's review is warranted to clarify when, under *Gasperini*, federal courts sitting in diversity must apply state-law excessiveness standards.⁴

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ORLANDO H. MARTÍNEZ-
ECHEVERRÍA

FERNANDO E. AGRAIT
701 Ponce de León Avenue
San Juan, P.R. 00907
(787) 722-2378

THEODORE B. OLSON

Counsel of Record

THOMAS H. DUPREE, JR.

AMIR C. TAYRANI

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

January 17, 2006

⁴ Respondents argue that HIMA waived its right to request remittitur of the awards for future care and loss of income. Opp. 17. Although respondents contend that HIMA did not challenge the future medical care estimates included in the life care plan prepared by respondents' expert Dr. Woodrich, this is not accurate. HIMA filed two motions in limine to exclude Dr. Woodrich's testimony and again objected at trial; the district court denied each of these objections. Pet. App. 12a. Respondents state that HIMA did not object when the jury asked to view the life care plan during deliberations. But by that point in the proceedings, the district court had made its position abundantly clear by denying HIMA's three previous motions, and HIMA's objection had already been preserved for appeal. See Fed. R. Evid. 103(a). Moreover, HIMA again contested the calculation of future medical expenses on appeal, but the First Circuit rejected HIMA's argument on the merits. Pet. App. 13a.